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ST. LOUIS, MO., FEBRUARY 2, 1894.

It is to be hoped that the senate will promptly confirm the nomination of Mr. Wheeler H. Peckham of New York as an associate justice of the United States Supreme Court. His selection is in every way satisfactory and commendable. He comes of a family of jurists, is learned in the law, and occupies a commanding position at the head of the New York bar. Mr. Peckham has recently received the rather unusual distinction of an election to a third term as president of the New York Bar Association and enjoys to an unusual degree the confidence of the legal profession. Owing to the fact that there is a vacancy the Supreme Court is not at present considering cases in which constitutional questions are involved. The condition confronting the court was recognized by it a few days ago, when, at the suggestion of one of the leading counsel in an important interstate commerce case involving a construction of the constitution, and which had been set down for argument, the court let the case go over to be called up when a full bench shall be secured. The necessity therefore for prompt action in the confirmation of Mr. Peckham will be seen.

In the recent Indiana case of Woodruff v. Bowen (34 N. E. Rep. 1113), it was held that the widow of a fireman cannot recover damages for his death caused by the collapse of a defective and dangerous building on which he was standing while fighting the flames. The fire had caught in the defendant's building and the plaintiff's husband went there at the call of duty. The building was weak in construction and being stored with paper goods which absorbed the water that was poured in, it collapsed under the heavy weight. The court based its decision on the ground that the fireman was a mere licensee, and therefore the defendant had no responsibility towards him, except that of "abstaining from any positive wrongful act," the fireman being regarded as a licensee merely because the law gave him a right as against the defendant to intrude upon the premises for the public good. A contemporary thinks it would be well enough as a result, if the simple test in all cases were whether the injured person was a so-called "licensee," but it hesitates to believe that this is the true test to be applied. It argues that the real test is whether the business on which the outsider enters is purely his own, or is partly or entirely that of the owners—in other words, whether he is there selfishly or for the sake of the owner. In the case of Plummer v. Dill, in 1892, the Massachusetts Supreme Judicial Court said: "There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." In the Indiana case above cited no one would or could deny that the whole object of the fireman's presence was the preservation of the defendant's property with that of others. The conclusion seems obvious. It certainly accords much more with our sense of justice that the fireman's widow should recover some compensation for the loss of her husband. In the case of Law v. Railway Co., 72 Me. 313, decided by the Supreme Court of Maine, damages were awarded to a custom-house officer, who was injured by a defect in the defendant's wharf, while watching there to prevent smuggling. The case of a fireman who is killed or wounded, owing to the defective contruction of the defendant's building, while endeavoring to save the defendant's property, seems in principle much stronger.

A local Chicago court lately considered the question as to the right of an American citizen to maintain in our courts a suit against a foreign government. The plaintiff, a citizen of the United States brought suit in the Superior Court of Cook County against the Province of New South Wales and by attachment levied upon an exhibit at the World's Columbian Exposition belonging to defendant. The court held very properly that an American citizen cannot maintain in our courts a suit of this character against a foreign power or government under the above circumstances; that the doctrine of non-suability in our courts applies although the Pro-

vince of New South Wales is only a dependency of Great Britain; that the disputes to which a foreign government, sovereign or dependent power is a necessary party cannot be in our courts without the consent of such foreign power and that the court has no jurisdiction of this case.

NOTES OF RECENT DECISIONS.

EQUITY JURISDICTION—CREDITOR'S BILL—SIMPLE CONTRACT CREDITORS.—The Supreme Court of the United States in Hollins v. Brierfield Coal & Iron Co., 14 S. C. Rep. 127, decided some important questions of law governing insolvent corporations. It was held that the settled rule of the Federal Courts that simple contract creditors cannot come into equity to obtain the seizure of their debtor's property, and its application to their claims, applies with the same force when the debtor is a corporation; and the rule is not changed either by the insolvency of the corporation, its failure to collect in full all stock subscriptions, its execution of an illegal trust deed, or the pendency in the same court of a suit to foreclose the same, for neither of these things, nor all together, operate to charge upon the corporation's property any lien or direct trust in favor of simple contract creditors. The expression, often used, that the property of a corporation constitutes a "trust fund" for its creditors, only means that when the corporation is insolvent, and a court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders; but as between a corporation itself, and its debtors, the former does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor. In a suit to foreclose a mortgage on the property of a corporation, simple contract creditors, who contest the validity of the mortgage, are not prevented from intervening to set up their claims by the rule which forbids, in a foreclosure suit, the litigation of a title adverse to the mortgagor. Where, pending a suit to foreclose a mortgage on the property of a corporation, certain simple contract creditors file a separate bill against the corporation, its stock and bondholders, and the mortgagee, alleging the invalidity of the mortgage, and attempting to subject the property to their claims, such bill must be dismissed for want of jurisdiction upon the entry of a foreclosure decree in the mortgagee's suit. Mr. Justices Brown and Jackson dissented.

NEGOTIABLE INSTRUMENT — BONA FIDE HOLDER — BANKS AND BANKING — RAISED DRAFT — PROXIMATE CAUSE.—In Exchange Nat. Bank v. Bank of Little Rock, decided by the Circuit Court of Appeals for the Eighth Circuit it appeared that a bank clerk whose duty it was to prepare exchange for the cashier's signature, so drew a draft for $25 to his own order that the amount could be readily altered and after procuring the cashier's signature by pretending that he wished to make a remittance of that amount, altered the draft so that it presented the appearance of a genuine draft for $2,500, and thereafter indorsed it, and procured it to be discounted. It was held that the forgery by the clerk, and not the negligence of the bank, was the proximate cause of the loss, and the bank was not liable therefor, and that the bank was not liable on the ground that the forger was its confidential employee, because in this transaction he acted as purchaser, and not as an employee, and because the purchase of the draft was complete, and he was the owner of it, when the forgery was committed. There are good reasons for holding the maker of negotiable paper liable for any loss of which his carelessness is the proximate cause. If he carelessly intrusts checks or notes having blanks therein that were evidently intended to be filled, to a third party, who subsequently fills up and sells them, or if he in trusts to a confidential clerk the duty of filling the blanks in notes or drafts he has assigned or indorsed, and the clerk inserts excessive amounts, he cannot defend against such paper in the hands of an innocent purchaser, and the reasons referred to above fairly apply. In such cases the loss is the natural and probable consequence of his own negligence, a loss that he might have and ought to have foreseen, a loss the risk of which he fairly assumes by his own acts. But says the court when the drawer has issued a draft or note complete in itself, but in such a form as to be easily altered without attracting attention, and it is

afterwards fraudulently raised by a third person, without his knowledge or authority, and then bought by an innocent purchaser, it is not his negligence, but the crime of the forger, that is the proximate cause of the loss. Forgery and consequent loss cannot be said to be the natural or probable consequence of issuing a draft inartificially drawn. The presumption is that dealers in commercial paper are honest men, and not forgers, and that such paper will not be changed. It will not do to say that every one whose negligence invites another to commit a crime is liable to a third party for the loss the latter sustains thereby. One who, by carelessly leaving a pile of shavings near his house, invites another to commit the crime of arson that results in the burning of his heighbor's buildings, is not liable to his neighbor for that loss. The farmer who negligently turns his horse into the highway, and thereby invites a thief to steal it, does nor thereby lose title to his horse when an innocent purchaser has bought him of the thief. Nor is there, in our opinion, any sound reason why the liability of the maker of a promissory note or bill of exchange, complete in itself when issued, but subsequently fraudulently raised without his knowledge or authority, should be measured by the facility with which a third person has committed the crime of forgery upon it, or why he should be held liable for the loss resulting from such a forgery. The altered contract is not his contract. His representation was not that the forged contract was his, but that the original contract was his, and the rule *caveat emptor* makes it the duty of the purchaser when he buys it, and not of the maker, to then see that it is genuine. To cite and attempt to distinguish the decisions upon this ques- would be a work of supererogation. The authorities have all been carefully reviewed, and the conclusion to which we have arrived has been reached in Holmes v. Trumper, 22 Mich. 427, by Mr. Justice Christiancy, with whom Chief Justice Campbell and Justices Graves and Cooley concurred, in Bank v. Stowell, 123 Mass. 196, by Chief Justice Gray, without dissent from any member of the Supreme Judicial Court of Massachusetts, in Burrows v. Klunk, 70 Md. 451, 17 Atl. Rep. 378, in Bank v. Clark, 51 Iowa, 264, 1 N. W. Rep. 491; in Fordyce v. Kosminski, 49 Ark. 40, 3 S. W. Rep. 892, and in Goodman v. Eastman, 4 N. H. 455; while the decisions in Simmons v. Atkinson & Lampton, Co., 69 Miss. 862, 12 South. Rep. 263; Charlton v. Reed, 61 Iowa, 166, 16 N. W. Rep. 64, and Angle v. Insurance Co., 92 U. S. 330, 340,— are to the same effect. This question has been much discussed, and the authorities differ, but we think the better reasons, the most forcible and convincing opinions, and the marked trend of the later decisions support the view of the court below.

CONSTITUTIONAL LAW—REPEALING GRANT OF LOTTERY FRANCHISE.—In Commonwealth v. Douglas, 24 S. W. Rep. 233, decided by the Court of Appeals of Kentucky, it was held, overruling earlier decisions in the same State, that the legislature has power to refuse the grant of a lottery franchise even though rights have been acquired and liabilities incurred upon the faith of the privileges conferred by such grant. The court said in part:

The Supreme Court of the United States, in Stone v. Mississippi (101 Sup. Ct., 814), in construing the provision of the Federal Constitution that declares that the State shall pass no laws impairing that obligation of contracts, held that the inhibition related to "property rights," and not to matters that were "governmental." The court then held, in strong and emphatic language, that lotteries, being a species of gambling, were vicious and demoralizing in the community, and that, as it was the trust duty of the State government to protect and promote the public health and morals, it could not sell, barter or give away that duty, and that the utmost power the legislature could exercise was to grant a license to carry on that species of gambling, which only protected the licensee from the pains and penalties imposed upon that species of gambling during the existence of the license, and that the legislature granting the license had no power to bind a subsequent legislature to its line of policy upon these subjects, and that a subsequent legislature might repeal the grant of the license, although it had been paid for. It seems to us that this decision, defining the provision of the federal constitution as to what subjects or contracts, and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decision holding the contrary rule.

But, apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual and governmental power of the States, to-wit: That the provision of the federal constitution in reference to contracts only inhibits the States from passing laws impairing the obligation of such contract as relate to property rights, but not to subjects that are purely governmental. The reason for this distinction must be apparent to all, for, when we consider that honesty, morality, religion and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at

once strikes the mind that the government, through its agents, cannot throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away. If it be conceded that the State can give, sell, and barter any one of them, it follows that it can thus surrender its control of all, and convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects, as far as the grantees are concerned; and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation, forbid that the commonwealth should possess a power so revolting, because destructive of the main pillars of government. The power of the State to grant a license to carry on any species of gambling, or with the privilege of revoking the same at any time, has an unwholesome effect upon the community, and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day, men confined in the State penitentiary for setting up and carrying on gambling shops whose tendencies are not much more demoralizing, if any, than the licensed lottery operator, who goes free under the protection of the law. The one wears a felon's garb, and the other is protected by a license, which he claims as an irrevocable contract, because he has paid for the privilege. The privilege ought never to be granted, and, under the present constitution, can never be. As said, to impress the privilege with the idea of contract because it was paid for, might fill the whole State, and especially the cities, with gambling shops and enterprises protected by contract; and the few gamblers that might not be thus protected, and who would be liable to be punished for gambling, would not be, because it would strike honest men as unjust to punish the poor wretch for doing that which was made lawful for others to do by paying for the privilege. As said, we are bound by the construction given to the provision of the federal constitution by the Supreme Court relating to the impairment of contracts by the States, to the effect that the provision does not relate to lottery franchises, though paid for, and that the matter of such grants being strictly within the police power of the State, the State could not sell or barter away its control of the subject.

CRIMINAL LAW—EMBEZZLEMENT—RATIFICATION BY INJURED PARTY.—In State v. Frisch, 14 South. Rep. 132, decided by the Supreme Court of Louisiana, it was held that so far as the right of the State to pursue and punish a criminal is involved, the subsequent ratification of the act by the injured party will not bar a prosecution. The court said in part:

The indictment charges the defendant with embezzling $200, which was one of the items in the account current submitted to Gassner & Co. There was evidence before the jury of ratification by Gassner & Co. of all the unauthorized acts of the defendant, and had the proof been sufficient, as alleged by defendant, the law applicable to the ratification by a principal of the unauthorized acts of the agent would be applicable in a civil suit between the principal and the agent. But it has no place in a criminal prosecution when the act is of such character as to involve a crime denounced by the State as opposed to public policy. Embezzlement is an offense of this character. The loss to the individual is a matter to himself. It is optional with him to recover the amount due him in consequence of the embezzlement in the implied contract to reimburse him. But the crime concerns the public policy of the State, and no agreement, compromise or ratification can make that which she has denounced as a crime an innocent act, leaving the offender free from the punishment attached to it. The offense of embezzlement is of that nature which the public takes notice of as injurious to itself. 1 Bish. Crim. Law, par. 232. Mr. Bishop says in the paragraph referred to: "Nothing can be more purely a tort to the individual alone than a simple larceny where there is no breach of the peace; no public loss of property, since it only changes hands; no immorality, corrupting the minds of the young; no person in any way affected but him who takes, and him who loses, the thing stolen. And as in larceny, so it is in many other crimes. A pubic offense is committed, while only an individual suffers." Any agreement to suppress the crime would be contrary to public policy, and void, as the State has the right to pursue and punish the criminal. Mechem Ag. par. 116; Shisler v. Vandike, 92 Pa. St. 447; McHugh v. County of Schuylkill, 67 Pa. St. 391. The case of Fagnan v. Knox, 66 N. Y. 525, was for malicious prosecution for the crime of embezzlement. The court, upon request charged: "If you find that the defend ant, prior to the complaint against the plaintiff charging him with embezzlement, settled with the plaintiff for the moneys, the defendant afterwards charged the plaintiff with having embezzled as and for a debt on a contract, expressed or implied, such fact would be evidence that the defendant did not believe the plaintiff had embezzled the said moneys." On appeal to the Court of Appeals the charge was held erroneous. Chief Justice Church, in the opinion of the court, said the effect of the charge "was to produce an erroneous impresion." "The effect of it was to convey the idea that the settlement and payment of the amount claimed by defendant was evidence that no crime had been committed, and the defendant did not believe that there had been. . . . The defendant had a legal right to settle with the plaintiff, and to receive payment for the amount abstracted as and for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution, nor did it furnish evidence that the defendant did not believe that the money had been embezzled." In the case of People v. Hurst (Mich.), 28 N. W. Rep. 838, relied upon by defendant, there was no question raised as to the "ratification" of the acts which constituted the embezzlement. It was a question of felonious intent—whether the mere failure to pay the money indicated a design to cheat and deceive the owner. A candid admission of the debt was made at once on inquiry, and partial payment was made and security given at different times for the debt. No such question is presented here. The bill does not present the question whether or not the transaction between the parties had assumed the shape of the facts in the above case. The bill of exceptions does not show that previous to the settlement the transaction assumed the shape of debtor and crediror, or that in the settlement offered in evidence there was any such relation between the parts, other than the implied contract to make restitu eon for the amount embezzled. The defendant wa

convicted. We must presume that all the constituent elements of embezzlement were proved, and among them concealment. On this point there is no conflict. The question then is did the presentation of the account to defendant, or, as is alleged, the account presented to Sugg made out by defendant at Sugg's request or demand, showing his wrongful use of the money, in the management of the business, his acknowledgment of the account, and his promise to pay the amount converted by him, and his refusal to assume other obligations, constitute such a state of facts as to make the business relation between the parties that of debtor and creditor? We think not. The embezzlement had been committed. No transaction between the parties could have prevented the prosecution, which was not to enforce any right of the prosecutors, but to punish a crime committed against the State.

HAWKERS AND PEDDLERS—WHO ARE —CITY ORDINANCE.—In Village of Stanford v. Fisher, the Court of Appeals of New York decided that one who, having a place of business in another town, goes about delivering goods at the house of his customers, in pursuance of orders previously taken, and takes orders for future delivery, is not a peddler, within the meaning of Laws 1883, ch. 465, authorizing village trustees to regulate or prevent peddling in the streets. Gray, J., says:

The evidence established that the defendant had a residence or store at Oneonta, in the neighboring county of Otsego, and transacted a business with persons in the village of Stamford, Delaware county, in soliciting orders, and subsequently delivering, pursuant to such orders, articles of groceries for family use. For this purpose he had a wagon, with which, about once in each month, he made trips to Stamford, filling his previous orders, and taking new ones at the various houses. The defendant was not shown to have sold, or to have offered for sale, any goods upon the street, or otherwise to have transacted this business than as described; so that the decision of the question turns upon the point of whether that method of conducting a business distinguishes it from the peddler's or hawker's occupation. It seems to me, clearly, that such a distinction does exist; that it is a very substantial one; and that, therefore, neither statute nor resolution can be held to apply to the defendant's case.

It is unnecessary to discuss the legislative power to enact the law in question. It is perfectly competent to empower municipal corporations to prescribe regulations for the orderly conduct of business within their limits, and upon the public streets, and to provide that the itinerant peddler or hawker should contribute to the revenues of the municipality by the payment of a license fee, in the nature of a tax upon his business, in return for the privilege and protection accorded to him in so carrying on his trade. Incidentally, there may exist the purpose, in authorizing such measures, to promote a just and equal protection of those traders who have a local habitation and their establishments in the village, and who bear their share of the municipal burdens. As the statute, however, is in restriction of the common law, and a general righ of persons to pursue a legitimate and innocent occupation and to deal rightfully and usefully with their property, it should receive a strict construction; and, in every instance where one is sought to be charged with a penalty for a violation of the village ordinance, his occupation must be shown to be clearly within those occupations which are aimed at. I would not hold that such a statute is not to receive an equitable as well as a strict construction, for it is in purpose beneficial to the community where it is to receive its operation. But its operation should be confined to those cases where it is plainly discoverable that the mischief exists for which the law was intended to provide a remedy, and where the need is evidenced for the extension of the protection intended by the legislature. We come, therefore, to consider whether the pursuit of this defendant can fairly be deemed to be that of a peddler, as it was alleged in the complaint of the village. Our attention is called to the definitions given by lexicographers to the term "peddler," and they substantially agree that he is a peddler who travels about the country, carrying wares for sale in small quantities. The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade, consisting in small wares, on foot or in a vehicle, about the country, offering them for sale, and then and there selling them. The statute, in coupling the terms "hawking" and "peddling," itself suggests the idea that the features of itinerancy and a public offering of goods for sale are present in the occupations of the hawker and the peddler. Either one avails himself of the highway for the conduct of his trade in about the same manner. In the case of the defendant, however, he resided in a different part of the State, and presumably contributed his share to the discharge of the public burden of taxation.

He did not hawk or cry out his wares in the public streets, nor did he expose, offer, or sell them thereon. He simply delivered at the houses of customers, from whom he had previously received orders, the articles ordered. The concept of such an occupation sharply distinguishes it from that of the itinerant street vendor of articles. The case of Rex v. McKnight, 10 Barn. & C. 734, is in point. There the defendant was in the employ of a tea dealer, and was sent by his master about the neighboring county once a fortnight soliciting orders, and on subsequent occasions was sent to deliver small parcels of tea in pursuance of these orders. This was held not to be an exposing for sale, or a carrying to sell, within the meaning of the hawkers' and peddlers' act, so as to subject the defendant to a penalty for trading without a license. In the decision of that case, it was considered as a material fact that the bargain for the goods and the delivery were on different occasions. Cases in the courts of other States, to which our attention has been called, serve to confirm the view taken here. Such are those of Com. v. Ober, 12 Cush. 498; Com. v. Eichenberg, 140 Pa. St. 160, 21 Atl. Rep. 258; and Ballou v. State, 87 Ala. 144, 6 South. Rep. 393. In my opinion the case of the defendant was not shown to be one within the meaning of the statute, and he could not be subjected to the penalty provided for in the village ordinance.

EXTENT OF THE POWER OF RAILWAY COMPANY TO MAKE RESTRICTIVE CONTRACTS IN THE TRANSPORTATION OF LIVE STOCK.

No question of negligence enters into this discussion. Perhaps, no other principle of the law of common carriers, is so well settled as that which denies to them any limitation on their common law liability, by way of contract, for their own negligence. This question needs not the citation of authorities to establish it. With reference to the carriage of live stock, the common law liability of railway companies, as common carriers, is much modified, and the same rule may hardly be said to apply. To the question of the extent of the rights of railway companies, in these contractual relations with shippers of live stock, under this modified rule of the common law, this article is to be confined. This exception or modification of the common law doctrine grows out of the inherent nature of the goods to be freighted. A reliable authority on the subject,[1] charges as unreasonable an attempt to impose upon the carrier of live stock, the same responsibility as incurred in the case of carriers of inanimate goods. In the latter case, by weight of authority the carrier is charged as an insurer of the property. But in the case of carriers of live stock the very nature of the property requires at least a modification of this severe common law rule. It has been very much questioned whether in the carriage of live stock the carrier can be considered in any respect as undertaking the responsibility of a common carrier. Live stock, though the subject of property, cannot be regarded as goods, in the carriage of which the office of the common carrier consists. There is much the same distinction between them as exists between the inanimate goods and the human beings who are not carried as passengers, or freight, but who in the nature of things and in such character resemble passengers rather than packages of common freight, and the responsibility to them must be measured by the law governing the carriers of passengers rather than freight.[2] It may be pertinent to remark here that the transportation of cattle and live stock generally by common carriers by land, was unknown to the common law, when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or the public enemy. These responsibilities and duties were fixed with reference to kinds of property, involving in their transportation much fewer risks, and of quite a different kind, from those which are incident to the transportation of live stock by railway. The reasons for a modified construction of the common law liability of common carriers when applied to the carrying of live stock is well stated in the opinion of the court in the case of the Michigan Southern & Northern Indiana Railroad Co. v. John McDonough.[3] The court in substance in that case hold that cattle being by nature much more liable to injury and loss in transportation than property, generally carried as freights, this mode of shipping them imposes greater risks of a different character, demanding more labor and special arrangement for their comfort and protection, and so does not come within the reasons which, by the common law, imposed upon common carriers the duty of absolute assurance of safe conduct so far at least as loss or injury through any want of care on the part of the carrier is concerned, and further, "though the defendants, the railway company, by their charter passed in 1846 were bound to take upon themselves the business of common carriers, this extended only to such property as was then usually transported by railroads, as common carriers, and other kinds of property, which, in the progress of invention and improvement might be offered for transportation, which should not impose risks of an essentially different mode of managing their road. The charter did not therefore, impose the duty of carrying cattle and live stock. The company could therefore only be held liable as common carriers, for the transportation of this kind of property, by special contract to that effect, or by professing or holding themselves out to the public, or to the plainitff, as doing that kind of business in the character and with the risks of common carriers." By an act of the legislature of Michigan 1867,[4] railway companies were forbidden to change or

[1] Hutchinson on Carriers, 2 Ed. Sec. 217.

[2] See Hutchinson on Carriers, 2 Ed. Sec. 217. Also cases cited in foot note.

[3] 21 Mich. 165.

[4] Act 124, Session Laws, p. 165.

limit their common law liability as common carriers, except by contract, such contract be wholly in writing and the court in the above case holds that these provisions apply only to those kinds of property which the company was, by its charter, bound to carry in that character, and any other kinds of property that they might assume to carry under special contract.

In this case may be found an exhaustive investigation, both by counsel and court, of the questions involved in charter rights, usage, and common law liability of railway companies as common carriers. The Michigan decisions seem to construe the power to make these restrictive contracts most favorably to railway companies. While holding fast to the basic principle which seems to require, in order to better serve the public interests, that railway companies as common carriers should be regarded as absolute insurers of, at least, inanimate freights, the courts by their decisions have held to a liberal policy in the construction of those contracts made by and between carrier and consignor where the contract is explicit and no advantage is taken of the consignor. As we noticed above by legislative act, railway companies operating their roads within Michigan were forbidden to limit or change their common law liability. This act as interpreted by the Supreme Court of the State in Michigan Railroad Co. v. Hale,[5] did not take from the carrier the right to contract with the consignor of goods to restrict its liability as a common carrier if the consignor was willing to agree to such terms. This combination of common law and legislative enactment law may be set aside as easily as either one by itself. And the court holds that the prohibition may be waived or changed by contract. The company may make any contract with the consignor relative to the transportation of his property, which the latter may deem conducive to his interest, and enter into, upon a consideration satisfactory to himself, though a diminution of the carriers common law responsibility results therefrom. The carrier is not to limit his common law liability by a mere notice indorsed upon the receipt given the consignor, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence *aliunde*, it will not be proved by the terms of the receipt alone, or be implied from the posting of notices or the delivery of same to the consignor. The law does not compel persons dealing with common carriers to rely and insist upon the liability, which in the absence of any contract, it imposes in their favor, but relies upon their competency to manage their own business affairs. And the court says that in this liberal construction of the doctrine, no consideration of public policy is contravened. While this is undoubtedly true, it is puzzling to understand what force is left to the legislative enactment. This case above cited overrules a former opinion of the court.[6] This was a case heard by the court several years previous to the passage of the general railway law.[7] In this case the court held against the right of the common carrier to restrict his liability by any form of contract written or unwritten. Thus a strange anomaly is presented here. A certain claimed right is denied the carrier previous to the passage of the act designed to settle the question adversely to the claims of the common carrier, when the same court called upon to construe this act as it settles these same questions, overrules its former position and establishes the doctrine the very opposite. The Wisconsin Supreme Court upheld the doctrine enunciated by the court in the case *supra*, Mich. Central R. Co. v. Ward, in some of its former opinions, but the later cases allow the restrictive clauses in its contracts, and even by indorsements upon the bill of lading,[8] while the Illinois courts are more inclined to require an express contract.[9] Under a contract which provided that the owners took all risks of loss, injury, damage and other contingencies "in loading, unloading, conveyance, and otherwise; whether arising from the negligence, default, or misconduct, gross or culpable, or otherwise, on the part of the railway company's servants, agents or officers," the Supreme Court of

[5] 6 Mich. 243. See also, 16 Mich. 79 (McMillan v. Mich. South. & N. I. R. R. Co.)

[6] Mich. Central R. Co. v. Ward, 2 Mich. 538.

[7] Session Laws 1855, p. 173.

[8] D. & M. R. R. Co. v. F. & M. Bank, 20 Wis. 122; Strohn v. D. & M. R. R. Co., 21 Wis. 562.

[9] Illinois Central R. R. Co. v. Adams, 42 Ill. 474; Adams Express Co. v. Haynes, 42 Ill. 89; Illinois Cent. R. R. Co. v. Frankenberg, 54 Ill. 88; Arnold v. Ill. Cent. R. R. Co., 83 Ill. 273; Field v. Chicago & R. I. R. R. Co., 71 Ill. 458.

Michigan in the case of Hawkins v. Great Western Railroad Co.,[10] held that a recovery might be had by the consignor of the stock if the injury was occasioned by the bottom of the cars giving out. Mr. Justice Campbell in giving his opinion cited the old English case Shaw v. The York & North Midland Railway Co.[11] Here under a contract which exempted the carrier from liability "for any injury or damage, however caused," the court expressed a doubt whether, if the plaintiff had alleged in his declaration a failure on the part of defendant to furnish proper and sufficient carriages, where it was shown that the injury was occasioned by this breach of that duty, notwithstanding the terms of the contract, he could not recover. In the absence of some showing, Mr. Justice Campbell held in the case above cited, that the plaintiff had proper opportunities of observation, and had notice of the actual condition of the cars and had assented, either impliedly or expressly to the use of the cars on which the stock was shipped, he had the right to expect that proper cars were used, and if they were not in proper condition for such use, and that if that unfitness was of such a character as to imply fault in the company, or their agents, for allowing them to be used, then the company should be held liable. And the wording of the contract was held not to cover the contingency of unfit cars.[12] In the second review of this case in 18 Mich. 432, the court holds the defendant liable as a common carrier, in respect to the furnishing of suitable cars for the transportation of such property. The contract did not cover the cause of the injury, and the liability of the company remained precisely as if no special contract had been made. Counsel for the railway company raised the point "that while the special contract might not excuse negligence on the part of the company or its chief officers, it might well protect them from the negligence of subordinate agents of the company if its chief officers had no knowledge of the use of defective cars, and employed proper agent." The court dismiss this plea with the statement that "the obligation of the company to furnish suitable cars under or notwithstanding this contract" was held to be absolute, in the former disposition of this case, upon reception of the property. The same court in a later case opinion by Mr. Justice Graves[13] held that railroad companies are not by the common law, common carriers of live stock, and can only make themselves such common carriers by assuming special relations with consignor. The same doctrine is found in Wharton on Negligence,[14] in a fair discussion of this question. In this same case the Michigan court reiterated the doctrine of the former opinions of the court, that common carriers may by special contract limit their common law liability and by doing this they become bailees of another class, or they become common carriers *sub modo*. The Missouri courts have held very steadfastly to the doctrine so well established in Michigan.[15]

It was held in the case of O'Bryan v. Kinney,[16] same court, that "as a general rule, when goods are delivered to a carrier for transportation, and a bill of lading, or receipt is delivered to the shipper, he is bound to examine and ascertain its contents and if he accepts it without objection he is bound by its terms and resort cannot be had to prior parol negotiations to vary such terms. That the shipper did not read the bill of lading or know its contents makes no difference, as he might have read it, and it was his duty to do so, and in the absence of fraud or mistake, the writing must be taken as the sole evidence of the final agreement of the parties."[17]

We will notice here some difference of opinion between the Missouri and Michigan courts, as to charging consignor with notice of the contents of his contract. We must confess that upon a bare legal, business principle the opinion upon this question of notice, by the Missouri court seems to us correct. But a just appreciation of the great growing principle of public policy seems to require in

[10] 17 Mich. 61.

[11] 13 Q. B. 347.

[12] Welsh v. Pittsburg Ft. Wayne & Chicago R. R. Co., 10 Ohio St. 65. See, also, St. Louis & Southeastern Ry. Co. v. Doman, 72 Ill. 504; Indianapolis B. & West. Ry. Co. v. Strain, 81 Ill. 504; Smith v. New Haven, etc. R. R. Co., 12 Allen, 531; Sager v. Portsmouth, S. & P. & E. R. R. Co., 31 Me. 228.

[13] The Lake Shore & Mich. South. R. R. Co. v. Perkins, 25 Mich. 329.

[14] Secs. 615-621.

[15] Ketchum v. Am. Ex. Co., 52 Mo. 390; Read v. St. Louis, K. C. & N. Ry. Co., 60 *Id.* 199; Rice v. Kansas Pac. Ry. Co., 63 *Id.* 314; Sturgeon v. St. Louis K. C. & N. Ry. Co., 65 *Id.* 569; McFadden v. Missouri Pac. Ry. Co., 92 *Id.* 343.

[16] 74 Mo. 125.

[17] See for same finding McFadden v. Missouri Pacific Ry. Co., 92 Missouri, 343.

all these contracts an equitable construction as a safe guard to the weaker party in interest. Not the mere pandering to any popular cry of corporate greed and aggressiveness which is apt to have its origin in the utterances of the political demagogue and parasite but rather the sentiment of paternal regard, which to a just degree, every government should have for its subjects.

This same principle has been adhered to by the Supreme Court of Iowa.[18] In this case the shippers ought to avoid the terms of a contract because he did not know the contents of the same. The court said in the absence of fraud or mistake it must be conclusively presumed that the shipper was acquainted with the contents of the contract he had signed. If he does not make himself acquainted with its contents the consequences of his folly rests with him. Courts cannot undertake to relieve parties from the effects of gross inattention and want of care in such matters. The uniform holding of the Supreme Court of Illinois has been that the carrier must show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the shipper.[19] This seems however to be contrary to the weight of American and English decisions, which hold that the fair and honest acceptance of a bill of lading, without dissent, raises a presumption that all limitations contained therein were brought to the knowledge of the shipper, and agreed to by him.[20]

The court in the case of Grace v. Adams above cited held that a receipt in proper form delivered to the plaintiff by the defendants as their contract with the terms and conditions expressed in the body of it, in a way not calculated to escape attention, and its acceptance by the plaintiff at the time of delivery of the package, and without any dissent on his part, this authorized the defendants to infer his assent to the terms. Mr. Justice Cooley in his opinion in the case of McMillen v. Mich. South. & North. Ind. R. R. Co.,[21] says "the fact that a restrictive notice is shown to have been actually received or seen by the owner of goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights, as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists."[22] The contract which railway companies are accustomed to give on the receipt of goods for transportation, and which are usually called bills of lading, fix the rights of parties and their liabilities, when the terms have been agreed upon. Bills of lading are signed by the carriers only. In case this kind of a contract is to be received as settling the rights and liabilities of the parties, evidence that assent was given to terms by the consignor, must be produced. This evidence would undoubtedly consist in the reception of the bill of lading by the consignor and his acting in pursuance of it. And this kind of evidence is usually conclusive. If the carrier should cause these restrictive provisions to be inserted in the contract in any manner which might mislead the consignor or so as not to attract his attention the question of a sufficient notice and consequent assent would hardly be settled in favor of carrier.[23] If the delivery of the contract to consignor was in such a manner as to lead him to believe, or think it intended for a mere receipt, it could not be held binding upon him as a contract, for the simple reason that the element of consent, or assent, to certain terms, was lacking.[24]

In this Michigan case, McMillan v. Mich. South. & North Ind. R. R. Co., *supra*, Mr. Justice Cooley suggests that "the law does not assume to be the guardian of parties *compotes mentes* in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence." And again,

[18] Mulligan v. Illinois Central R. R. Co., 36 Iowa, 181.

[19] Boscowitz v. Adams Ex. Co., 93 Ill. 523; Field v. Chicago, etc. R. R. Co., 71 Ill. 458; Adams Express Co. v. Haynes, 42 Ill. 89.

[20] See 3 Wood on Railways, 1577-78 note 2; Lawson on Contracts of Common Carriers; Hutchinson on Law of Carriers, Secs. 238 and 239; Schouler on Bailments and Carriers Secs. 464-5. See, also, Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131; St. Louis, Kansas City & North. Ry. Co. v. Clary, 77 Mo. 634, 46 Am. Rep. 13; Squire v. N. Y. Cent. Ry. Co., 98 Mass. 239.

[21] 16 Mich. 111.

[22] Citing N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. 382.

[23] Brown v. Eastern R. R. Co., 11 Cush. 97.

[24] King v. Woodridge, 34 Vt. 565.

"moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freight in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs will not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract." In this case the question was raised as to these special contracts being void for want of consideration, unless it is shown that in return for this release of a legal liability, the railway company has not made a deduction in the rates of transportation The court's opinion is, as expressed by Judge Cooley, that they have no right to assume that the charges are the same that they would have been had the restrictive clause been omitted. "If by the charter of a railroad corporation, maximum rates had been established, and the corporation had attempted to change these rates for a restricted liability, a case would be presented coming within the principle of this objection.[25] The court observed further: "It was also said on the argument, that a rule such as we have now laid down, would place the public at the mercy of the railroad companies, who would refuse to give any other than restrictive bills of lading. It is enough for us to say in this case, that railroads chartered as common carriers have no such power and the consignor can assent to the restriction in each instance, or refuse his assent at his option." The Arkansas Supreme Court has held a shipper bound by contract restricting carrier's liability though he did not read it, nor hear it read before signing it, provided the carrier resorted to no unfair means, and practiced no fraud or imposition in procuring the signature and the consignor had an opportunity to know the contents of the contract.[26] In the above case the court says "every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places, now undertakes to carry his goods subject to the old common law liability of the carrier. He knows moreover, that bills of lading are constantly given not only as the evidence of the receipt of the goods, but as an express and direct notice, that they will be carried on certain terms. Knowing this he cannot be willfully blind and plead ignorance, when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability, he should have said so, and have either declined to employ him, or sued him for his refusal after tendering a reasonable sum for his services and risk.[27]

The same court (Arkansas) also held that a contract fairly entered into between the railway company and shipper of live stock over its road, restricting the company's liability in any case to the sum of $50 for each animal lost, is when based upon a reduction in the charge made for transportation of the stock, reasonable, and will be enforced as a measure of the company's liability, although the animal lost is shown to have been worth considerable more. Under the statutes of the State of Texas a railway company is allowed but little option in these matters.[28] While making the duty of receiving and transporting freight over all lines of railroad within the State obligatory upon the companies as common carriers, the companies are denied the right to make any special contract with reference to the carriage of live stock, and are held as an absolute insurers against loss from any cause, except the act of God or of the public enemy, the act of the owner, vicious propensities or inherent character or "proper vice" of the animals. The court of Texas in the case of Gulf, Colorado, and Santa Fe Ry. Co. v. Frawick[29] construe this statute literally and strictly against this power of restrictive contract In this case the cattle were shipped under a special contract, at a rate lower than the regular rate. Here we find the basis of a good consideration for this kind of con-

[25] Citing Bis v. N. Y. Central R. R. Co., 25 N. Y. 449.

[26] St. Louis, Iron Mt. & South. Ry. Co. v. Weakley, 50 Arkansas, 397, 7 Am. St. Rep. 104.

[27] Hutchison on Carriers, Sec. 240; McMillen v. M. S. & N. J. R. R. Co., 16 Mich. 79; Squire v. N. Y. Cent. R. R. Co., 98 Mass. 239; Long v. N. Y. Cent. R. R. Co., 50 N. Y. 76; McIlroy v. Buckner, 35 Ark. 555; Hallenbeck v. Dewit, 2 Johns. 404; Reid v. Dwight Mfg. Co., 2 Cush. 80, 87; Harris v. Story, 2 E. D. Smith 363, 367; Lewis v. Gt. West. Ry. Co., 5 Hurl. & W. 867; Cooley on Torts, 488-491. Greenfield's Estate, 14 Pa. St. 489, 504; Morrison v. Phillips & Colb. Con. Co., 44 Wis. 405, 409; Mulligan v. Illinois Cent. Ry. Co., 36 Iowa, 181; Grace v. Adams, 100 Mass. 505.

[28] R. S. 277.

[29] 68 Texas, 314.

tract as intimated by Mr. Justice Cooley above. Yet the court in this case observes that railway companies are deprived under the Texas statute of the right to limit their liability by contract, "even as to matters in reference to which they might legally contract under the common law." The Texas court further says, "the common law duties and liabilities, and not those duties and liabilities as they may be affected by contracts lawful under the common law, are the duties and liabilities of common carriers under the statutes of this State, and they cannot be restricted, or limited by any contract or agreement whatsoever in cases to which the statute is applicable. The rule may seem a harsh one, but be that as it may, the legislature of this State has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize" and again, "the duties and liabilities imposed on common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common law liability would necessarily follow to the extent to which duty existing without a contract might be dispensed with by it."[30] In the light of this language, the further statement of the court that "we see no reason why contracts executed upon sufficient consideration, and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts," seems at least a trifle inconsistent, but is, perhaps, good law. The restrictive statement as to the time within which action is to be brought for the recovery of damages is held a saving clause in this case. A contract limiting liability of carrier to his own line, and containing a stipulation in an agreement for the carriage of goods that the company upon whose line a loss or an injury occurs shall be liable therefor, and the receiptor exempted, held void in the Tennessee court.[31] This is undoubtedly the correct rule of law with reference to liabilities of connecting lines. This discussion has already reached a length not intended. It might well be prolonged with profit, perhaps, but a regard for the rule which limits to an extent these discussions or essays will necessitate leaving the subject for the present.

PERCY EDWARDS.

Owosso, Mich.

[30] Citing Missouri Pac. Ry. Co. v. Harris, 67 Texas, 166.

[31] Merchants' Dispatch Trans. Co. v. Bloch Bros., 86 Tenn. 392.

PHYSICIANS — MALPRACTICE—PRACTICE OF DIFFERENT SCHOOLS.

FORCE V. GREGORY.

Supreme Court of Errors of Connecticut, May 22, 1893.

In an action against a homeopathic physician for malpractice, evidence having been given by witnesses as to how the case should have been treated, but also how the allopathic school would treat it, defendant having requested a charge on the subject, the court should have instructed that the jury were not to consider the relative merits of the two schools, but that, so far as defendant was to be judged by either, it was by the tenets and practices of his own school.

FENN, J.: This is an action by a minor child to recover damages against the defendant, who is a homeopathic physician, for alleged malpractice in treating her for ophthalmia. The jury returned a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed to this court.

The only questions presented, which are necessary to consider, relate to the charge of the court to the jury. Evidence was offered to show that the defendant, in treating the plaintiff, adopted the remedies prescribed by the homeopathic practitioners. It appeared that the allopathic school of medicine would treat such a case differently, and in the latter way the plaintiff claimed that she ought to have been treated. The defendant asked the court to charge the jury "that treatment by a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools." The court refused to so charge, and charged as follows: "In regard to that matter, I will say that the defendant's negligence or want of skill in the treatment of the plaintiff's eye must be determined by all of the evidence in the case, and if the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant. You should also take into consideration the training and education of the defendant for his profession, the experience which he has had, and the degree of skill with which he handled the case, all bearing upon the question whether the

defendant used ordinary care and skill in the treatment of the plaintiff." The defendant claims that the court erred, both in refusing to charge as requested, and in charging as it did.

In the absence of special contract physicians and surgeons, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill, and diligence. Landon v. Humphrey, 9 Conn. 209; Kendall v. Brown, 74 Ill. 232; Small v. Howard, 128 Mass. 131; Ballou v. Prescot, 64 Me. 305; Leighton v. Sargent, 31 N. H. 119; Ely v. Wilbur, 49 N. J. Law, 685, 10 Atl. Rep. 385, 441; Potter v. Warner, 91 Pa. St. 362; Hathorn v. Richmond, 48 Vt. 557; Gates v. Fleischer, 67 Wis. 504, 30 N. W. Rep. 674. In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases. Hathorn v. Richmond, *supra;* Utley v. Burns, 70 Ill. 162; Almond v. Nugent, 34 Iowa, 300; Small v. Howard, *supra;* Leighton v. Sargent, *supra.* In addition to this, however, regard must be had to the advanced state of the profession at the time of the treatment. Small v. Howard, *supra;* Gates v. Fleischer, *supra;* Smother v. Hauks, 34 Iowa, 286; Nelson v. Harrington, 72 Wis. 591, 40 N. W. Rep. 228.

Premising these general principles, we come to the precise question presented by the appeal: Ought the defendant's request to charge to have been complied with? And was the charge, as given, correct and sufficient? The language of the request may be found in Patten v. Wiggins, 51 Me. 504, where the following charge was held to be correct: "If there are distinct and different schools of practice, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that the parties so understood it. The jury are not to judge by determining which school, in their own view, is best." And the same principle was clearly stated, in an able opinion, in Bowman v. Woods, 1 Greene, 441, and we are aware of no authority to the contrary. But, notwithstanding this, it seems to us that the inherent difficulty in an endeavor to vindicate the action of the court below is not because the court failed to charge in the identical language of the request, nor because of the language actually used by the court which appears correct so far as it goes, but rather because the court, in refusing to charge as requested, and only charging as it did, omitted to bring to the attention of the jury a consideration which, in view of the testimony received, and the claims made thereon by counsel, ought to have been presented to them. It having appeared how the allopathic school of medicine would treat a case of the character of the one in question, the court, as we have seen, said: "If the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to the treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant." Doubtless, this is correct. The testimony should be so weighed. But if the defendant adopted the treatment, not of one particular school in the abstract, but of his own particular school, which he publicly professed and practiced, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, such testimony should be weighed, not alone with regard to bias or prejudice influencing the testimony of witnesses, but with regard to bias or prejudice which might influence or incline the jury in favor of one school rather than the other; for, as was said in Patten v. Wiggin, *supra*, "the jury are not to judge by determining which school, in their own view, is best." And as it seems to us, from the testimony presented, which did not stop with the statement of how, in the view of the witnesses, such a case ought to be treated, but went further, and stated how "the allopathic school of medicine would treat it," it was precisely from such bias or prejudice the defendant stood in danger. Indeed, the counsel for the plaintiff freely admitted, in argument before us, that the respective merits of the two schools of medical practice were—and, as he claimed, of right ought to have been—on trial before the jury. We cannot concede such right, and the jury, we think, should have been told that the relative merits of the two schools were in no sense before them for their consideration; that, so far as the defendant was to be judged by either, it was by the tenets, rules, principles, and practices of his own school, not by those of another; and that, if the defendant adopted the treatment laid down by his own school the fact, that another school prescribed another treatment tended in no wise to show that the defendant was chargeable with lack of skill or negligence. It would seem that if it could be held negligent or unskillful, in a given case, to use the treatment prescribed by the school to which the practitioner belonged, such negligence or want of skill must consist either in the mode of use, the application of such remedies under improper circumstances, or because they were intrinsically wrong, inappropriate, or inadequate. If there be any valid objection to the language quoted from Patten v. Wiggin, *supra*, it is in the failure to incorporate with the general statement the further one that the test there given does not exclude the duty of keeping pace with the progress of professional knowledge, ideas, and discoveries, to the extent that a faithful, conscientious, and competent practitioner, of whatever school, may be reasonably expected, and is therefore lawfully required, to do, not because the test of the treatment of some other school can be applied. It may be added that the general ex-

pressions in the charge under consideration, that the question of defendant's negligence "must be determined by all of the evidence in the case" and that the jury should consider "the training and education of the defendant for his profession, the experience which he had had, and the degree of skill with which he handled the case," in no sense appear to meet or supply the wanting element in the charge, and that because of such element, if the unqualified language of the request was too broad, still the rule stated in Seeley v. Town of Litchfield, 49 Conn. 138, applies, and that, "if it was not the duty of the court to charge precisely as requested, yet it was its duty to respond to the request by charging the jury correctly on that subject."

It was not claimed that the fact that the plaintiff was an infant of tender years, incapable of contracting, and that the physician was called by her father, in any way extended or altered the implied contract and duty of the defendant, nor do we think such a claim, if made, would have been valid. It appeared that the defendant had, at least to some extent, been the family physician, and had previously, as such, prescribed for the plaintiff; but this circumstance, also, is one to which no importance has been attached. There is error, and a new trial is granted. The other judges concurred.

NOTE.—Physicians, surgeons and dentists, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession and are under a duty to exercise reasonable and ordinary care, skill and diligence, but that is the extent of their liability. Nevins v. Lowe, 40 Ill. 209; Barnes v. Means, 82 Ill. 379; Long v. Morrison, 14 Ind. 595; Jones v. Angel, 95 Ind. 376; Tefft v. Wilcox, 6 Kan. 46; Branner v. Stormont, 9 Kan. 51; Small v. Howard, 128 Mass. 131; Hitchcock v. Burget, 38 Mich. 501; Getchell v. Lindley, 24 Minn. 265; Patten v. Wiggin, 51 Me. 594; Ballou v. Prescot, 64 Me. 305; Leighton v. Sargent, 31 N. H. 19; Ely v. Wilbur, 49 N. J. L. 685; 14 Am. & Eng. Ency. of Law, 76, and cases cited. A person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. The burden of proof is upon the plaintiff in an action for malpractice to show that there was a want of due care, skill and diligence (Holtzman v. Hoy, 19 Ill. App. 459; Baird v. Morford, 29 Iowa, 531; Vanhoover v. Berghoff, 90 Mo. 487; Craig v. Chambers, 17 Ohio St. 253; State v. Housekeeper, 70 Md. 162), and also that the injury was the result of such want of care, skill and diligence. Getchell v. Hill, 21 Minn. 464. The reasonable and ordinary care, skill and diligence which the law requires of physicians and surgeons is such as physicians and surgeons in the same general neighborhood, in the same general line of practice ordinarly have and exercise in like cases. Hathorn v. Richmond, 48 Vt. 557; Wilmot v. Howard, 39 Vt. 447; Uttley v. Burns, 70 Ill. 162; Small v. Howard, 128 Mass. 131; West v. Martin, 31 Mo. 375. The locality in which a physician or surgeon practices is to be taken into account. One practicing in a small town or sparsely settled country district, is not to be expected to exercise the care and skill of one residing n and having the opportunities afforded by a large city. He is bound to exercise the average degree of skill possessed by the profession in such localities generally. Gramm v. Boener, 56 Ind. 497; Kelsey v. Hay, 84 Ind. 189. Physicians and surgeons should keep abreast of the times and make use of the latest and most approved methods and appliances, having regard to the locality and general practice of the profession. And it is for the jury to decide from the particular circumstances of each case whether the physician has fulfilled his duty in this respect. McCanless v. McWha, 22 Pa. St. 261; Vanhoover v. Berghoff, 90 Mo. 487. A departure from approved methods of practice resulting in injury to the patient will render the medical practitioner liable however honest the intention and expectation of benefit to the patient may be. Physicians and surgeons are bound to give their patients the benefit of their best judgment, but they are not liable for a mere error of judgment which is not so gross as to be inconsistent with reasonable care, skill and diligence. Tefft v. Wilcox, 6 Kan. 46; Patten v. Wiggin, 51 Me. 594; Vanhoover v. Berghoff, 90 Mo. 487; Leighton v. Sargent, 27 N. H. 460; Carpenter v. Blake, 60 Barb. 488; Williams v. Poppleton, 3 Oreg. 139; West v. Wartin, 31 Mo. 375; Howard v. Grover, 28 Me. 397.

The fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill and diligence. Nevins v. Lowe, 40 Ill. 209. If the fault or negligence of a patient or his attendant contribute to the patient's injury he cannot recover for malpractice by the physician or surgeon. Lower v. Franks, 115 Ind. 334; West v. Martin, 31 Mo. 375; Potter v. Warner, 91 Pa. St. 362; Reber v. Herring, 115 Pa. St. 599. Where the injury attributable to the fault of the patient can be separated from that of the physician the former may recover for so much of the injury as is due to the fault of the latter. Hibbard v. Thompson, 109 Mass. 286; Wilmot v. Howard, 39 Vt. 447.

A late case on the subject of malpractice is Young v. Mason, decided by the Supreme Court of Indiana, 35 N. E. Rep. 521. It was therein held that, though a surgeon negligently fail to properly reduce the fracture of a limb, the patient cannot recover damages from the surgeon, if the limb become stiff, if such stiffness result in part from the patient's violation of the surgeon's orders in treating the limb. The case, citing previous authorities, applies the ordinary doctrine of contributory negligence to malpractice cases. The court lays down the following general principles in the conclusion of the opinion: "Where both the surgeon and patient are free from negligence, or where the surgeon and patient are both guilty of negligence, or where the surgeon is free from fault and the patient is guilty of negligence, no recovery can be had by the patient against the surgeon in any case. It is only where the surgeon is guilty of negligence and the patient is without negligence on his part contributing in any degree to such injuries that the patient can recover damages of the surgeon. In this case it appears, as we have seen, that both parties were, in some degree at least, at fault in producing the injuries in question, and therefore the court below did not err in rendering judgment for the appellee."

Upon the subject of the principal case it seems that the law does not favor any particular school of medicine and the treatment of a physician is to be tested by the principles of that school to which he belon

Bowman v. Woods, 1 Greene (Iowa), 441; Patten v. Wiggin, 51 Me. 594; Heese v. Knippel, 1 Mich. (N. P.) 109; Williams v. Poppleton, 3 Oreg. 139; Corsi v. Maretzk, 4 E. D. Smith (N. Y.), 1. Clairvoyants do not constitute a school since they have no fixed principles or formulated rules for the treatment of disease. They are under a duty to treat their patients with the ordinary skill and knowledge of physicians in good standing practicing in their vicinity. Nelson v. Herrington, 72 Wis. 591.

JETSAM AND FLOTSAM.

EQUITABLE OYSTER STEWS.

Not long ago a certain Chicago corporation engaged in the dry goods trade became insolvent, and was placed in charge of a receiver. The receiver was empowered to continue the business of the coporation, and proceeded to do so. Attached to the retail store of the insolvent corporation is a restaurant to which the fair bargain-hunters resort for rest and refreshment after their arduous exertions in shopping. Inasmuch as such a restaurant is a necessary appurtenance to a modern dry goods house, it became necessary for the receiver to continue the restaurant. Accordingly there appeared in the daily papers an immense advertisement of the receiver's sale. After describing the wonderful bargains in haberdashery to be obtained at this sale, the receiver set forth the advantages of the aforesaid restaurant, and among other delicacies, announced: "Oyster Stews, only 20 cents." Shades of Hardwicke and Eldon! Has it come to this, that the chancellor, once the keeper of the king's conscience and of the great seal, should now be engaged in making ten-penny oyster stews? Little did old John Waltham suspect when he devised that *bete noire* of the old common law judges, the *subpœna*, that the result of his ingenuity would be to give the court of chancery jurisdiction over oyster stews made five centuries later. Nor could the judges who laid down the well-known rule in the ancient case of Shelley, have foreseen that that rule would be of no aid to the court of today in an oyster-shelly case.

Since the tenancy of modern times is toward the codification of the law, the following *code de cuisine* is suggested, with the hope that the Commissioners on Uniform State Legislation may be able to secure its universal adoption.

1. Courts of equity shall have concurrent jurisdiction with the admiralty courts over all navigable oyster-beds.

2. Either party to the action may have a decree for the discovery of the location of such oyster-beds.

3. The rule of evidence forbidding "fishing expeditions" shall not apply when discovery of said oyster-beds is sought.

4. Only adult oysters of sound mind shall be used for culinary purposes, those insane or under age being under the especial protection of the court.

5. The oysters may be gathered either in a hanaper or a petty-bag, but must be transmitted to the court kitchen without laches *Æquitis vigilantibus non dormientibus subvenit.*

6. Profert of the oysters may be demanded by the defendant.

7. The oysters must be opened in season. If not opened in season the party prejudiced by such failure to open them in season may demand a continuance and fresh oysters.

8. Title to the oysters may be acquired by twenty years adverse possession, but such possession must be *nec ai nec clam.*

9. The oysters will be served *rari nantes in gurgite vasto*, in order to prevent excessive court costs.

10. Crackers will be added to the stew as *tabulæ in naufragio* for the oysters. Any party desiring bread in addition must apply to the Master of the Rolls.

11. He who comes into equity must do so with clean hands and a white apron. (This refers to the cooks and waiters only).

12. The fee (to the waiter) may be kept in suspense, any rule of the common law to the contrary notwithstanding; but no waiter shall receive a fee upon a fee.

13. Any person finding fault with any stew made under the direction of the court shall be guilty of constructive contempt, but shall be allowed to purge himself by any lawful means.

14. The contingent remainders of all stews will be kept *in gremio legis.*—*Northwestern Law Review.*

OLD TIME DEMOCRATS ARE THE JUDGES OF MISSOURI'S SUPREME BENCH.

"I am now convinced that the country is safe," said J. B. Johnson, "for I know that democracy of the purest water, the good old-fashioned sort, exists in all its old-time lovliness at Jefferson City.

"While submitting an argument before Division No. 1 of the Supreme Court, I noticed the grave and reverend judges now and then reaching under the high railing, behind which they sat in judicial dignity, and surreptitiously but frequently conveying to their lips something or other concealed from the vulgar gaze.

"My curiosity was excited, but it was not until later in the day that I discovered the meaning of their unusual action. Having occasion to pass back of the bench into division No. 2, in returning I had a full view of the railing behind which the judges sat, and there on a shelf lay a great hank of long green tobacco, from which each judge, except Judge Barclay, was in the habit of pinching off a chew as the spirit moved him. Therefore, I say the country is safe, for so long as the judges of the Supreme Court are democratic enough to chew long green tobacco, you can count on'em voting the old ticket straight without a scratch."—*Nevada Post.*

BOOK REVIEWS.

BIDDLE ON INSURANCE.

The scope of the work may be best stated in the words of its author who says "it is an attempt to develop the principles applicable to all branches of non-marine insurance by regarding the contract of insurance as the fundamental idea of the work and then by proceeding to consider its structure, the essential elements in its formation, the rights that accrue to the parties to it after it is formed, the capacity to avoid it, its performance, the consequences dependent upon its breach and the measure of damage. An endeavor has been made to embrace the many principles of law applicable to this subject in as brief and compact a form as possible without being obscure, though the difficulty in this respect is considerable on account of the universality of the contract and the subtlety of the distinctions frequently drawn by the courts." The main topics of the work, wrought out in detail under

sub-heads and chapters are: The formation of the contract. Rights of the parties in the contract before the contingency insured against occurs. Avoidance of the Contract, Performance of the Contract, Breach of the Contract and Measure of Damage. The work is in two large volumes. The text is admirably prepared and the diligence of the author is easily discernible in the citation and discussion of the authorities. This work is intended to be and is undoubtedly a comprehensive treatise on the law applicable to Fire, Life, Accident, Guarantee and other non-marine risks and as such has an advantage over most of the works on the specific topics. In fact, as it occurs to us, this is the only modern work of any pretentions which covers the entire subject and for that reason should be popular with the profession. It is published by Kay & Brother, Philadelphia.

PARSONS ON PARTNERSHIP.

This is the fourth edition of a work which first appeared in 1867 and which has always been considered as one of the classics of the profession. For that reason an extended notice on our part would seem to be superfluous. It is sufficient to say that the work of the present editor Joseph Henry Beales, assistant professor of law in Harvard University seems to have been conscientiously performed and in harmony with the design and great reputation of the book. The notes prepared by the editor are extensive and add very much to the substantial value of the book. It is in one volume beautifully printed and bound. Published by Little, Brown & Co., Boston.

BIGELOW ON BILLS AND NOTES.

This is a twelve mo. volume of over three hundred pages bound in cloth containing the elements of the law of Bills, Notes and Cheques intended for the use of students. It is admirably prepared and contains general principles of the law clearly and concisely stated. It is published by Little, Brown & Co., Boston.

AMERICAN DIGEST (Annual), 1893.

This immense volume of nearly fifteen hundred pages contains a digest of all the decisions of the United States Supreme Court, all the United States Circuit and District Courts, the courts of last resort of all the States and Territories, and the intermediate courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri and Colorado, U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as reported in the National Reporter system and elsewhere from September 1, 1892, to August 31, 1893. It also contains notes of English and Canadian cases, memoranda of statutes, annotations in leading periodicals, etc., also a table of the cases digested and a table of the cases overruled, criticised, followed, distinguished, etc., during the year. References to the State Reports are given by an improved method of topical citation. It will be seen from the above that the work lacks nothing that is necessary to make it a complete digest of decisions for the year it comes and we have no hesitation in commending it to the profession as comprehensive, thorough, accurate and reliable. We have this and preceding annual digests before us and make constant use of them in editorial work and our use and admiration for the series grows with the issue of each volume. Its admirable arrangement of heads and sub-heads and its means of ready reference are especially noteworthy. It can be had of its publishers, West Publishing Co., St. Paul, Minn.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Application—Classification.—Where an applicant for insurance against accident makes a true and full statement of his occupation to the company's agent, the company is bound, after loss, by the classification which the agent gives him; and if he is wrongly classified, according to the company's rules, the fact that he certifies to an understanding of the company's classification of risks, and that he belongs to the class given, is immaterial, when in fact his only means of understanding such classification is through the representations of the agent.—PACIFIC MUT. LIFE INS. CO. V. SNOWDEN, U. S. C. C. of App., 58 Fed. Rep. 342.

2. ACCOUNTING.—A sheriff in possession of a stock of goods pending their sale for the satisfaction of certain attachments in his hands, having sold a part of said goods, and collected claims due the attachment defendant, paid the proceeds of such sales and collections to the purchaser of the stock, who bought irrespective of such sales and collections: Held, in a suit for an accounting between the attachment defendant, who has paid all claims against him, and the recipient of such proceeds and collections, that said attachment defendant is entitled to recover the amount of such proceeds, with interest from the time they were received by said purchaser.—MCCONNELL V. FIRST NAT. BANK OF LINCOLN, Neb., 56 N. W. Rep. 1013.

3. ADMINISTRATION—Claims against Estate.—The bar of Code 1880, §§ 2026, 2028, against claims against the estate of a decedent which have not been proved within the prescribed time, cannot be waived by conduct of the administrator, however misleading or designing.—NAGLE v. BALL, Miss., 13 South. Rep. 929.

4. ADMINISTRATION—Foreign Will.—Under Code Civil Proc. pt. 3, tit. 11, ch. 2, art. 3, entitled "Probate of Foreign Wills," and providing that an authenticated copy of the will and of its probate in any foreign country or State "shall be produced by the executor or other person interested in the will, with a petition for letters," and that after proper notice and proofs, there shall be "letters testamentary, or of administration, issued thereon," letters of administration must, in the absence of a petition by the executors, be granted to a person "interested in the will," who applies for them, to the exclusion of the public administrator. — IN RE BERGIN'S ESTATE, Cal., 34 Pac. Rep. 866.

5. ADMIRALTY—Shipping — Wharfage.—A stipulation in a charter party that cargoes are "to be brought to and taken from alongside, at charterer's risk and expense, and, should there be any lighterage or wharfage, this to be also for charterer's account," makes the charterer, or the consignee (who stands in his place), responsible for wharfage in unloading, as well as in loading.—JOHNSON v. BAUGH & SONS CO., U. S. D. C. (Penn.), 58 Fed. Rep. 424.

6. ADVERSE POSSESSION.—A title acquired by adverse possession is one in fee-simple, and is as perfect a title as one by deed. The legal effect of such title not only bars the remedy of the owner of the paper title, but divests his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. The title so acquired is predicated upon the presumption or proven fact that the prior owner has abandoned the premises.—DEAN v. GODDARD, Minn., 56 N. W. Rep. 1060.

7. ADVERSE POSSESSION — Railroad Company.—Possession of land by a railroad company, and its use as a right of way for more than 20 years, constitute good title.—EAST ST. LOUIS & C. RY. CO. v. NUGENT, Ill., 35 N. E. Rep. 464.

8. APPEAL—Delay—Damages.—Where a party knows that, under the decisions in Texas, the owner of property wrongfully seized and taken from him by a sheriff under an execution can recover its value, though the owner bought the property at the sheriff's sale for a less amount, an appeal taken by him from a judgment so holding will be treated as taken for delay, subjecting him to the penalty for such an appeal.—CASEY v. CHATTOR, Tex., 23 S. W. Rep. 1114.

9. APPEAL — Parties.—After confirmation of a foreclosure sale of a railroad, a decree was made, declaring certificates issued by a receiver in a former suit a prior lien on the proceeds of the sale, which were less than one-half the mortgage indebtedness. There was no liability for a deficiency on the part of the stockholders, or otherwise: Held that, the railroad corporation having become practically defunct by the decree of foreclosure, the sale, and the subsequent decree of confirmation, and having no interest in the proceeds, it need not be joined as an appellant from the decree, but that the appeal might be prosecuted by the complainant alone.—MERCANTILE TRUST CO. v. KANAWHA & O. RY. CO., U. S. C. C. of App., 58 Fed. Rep. 6.

10. APPEAL—Parties—Amendment.—When an action has been tried in a justice's court without a written complaint, and appealed and tried *de novo*, plaintiff, pending the latter trial, may amend by joining another as co-plaintiff, on a showing that he and such other are partners in the property in controversy.—SOUTHERN EXP. CO. v. BOULLEMET, Ala., 13 South. Rep. 941.

11. APPEAL—Parties—Corporations.—In a suit against a corporation another corporation cannot acquire the right to appeal by merely suggesting that it is the successor in interest of the defendant, without taking any steps to be made a party.—LOUISVILLE, E. & ST. L. CONSOLIDATED R. CO. v. SURWALD, Ill., 35 N. E. Rep. 476.

12. APPEAL—Vacating Default — Judgment.— A motion to vacate a judgment must assign reasons for the proposed action of the court, but, if the causes are set forth in an accompanying paper, and submitted to the court in that form, and acted upon by it, a reviewing court will not declare its ruling thereon void, although it may be erroneous.—ROH v. VETERA, Neb., 56 N. W. Rep. 977.

13. APPEAL BOND — "Appellate Court."—An appeal bond obligated appellant, in case the judgment of "the Appellate Court" should be against him, to perform its judgment, pay damages and costs accrued in the court below, or which might accrue in "the Appellate Court:" Held, that the phrase "Appellate Court" sufficiently described whatever court might give final judgment in the case.—PREWITT v. DAY, Tex., 23 S. W. Rep. 982.

14. APPELLATE COURT—Supreme Court—Appeal.—Act April 13, 1892, § 5, provides that "the judgment of the courts of civil appeals shall be conclusive upon the facts of a case." Rev. St. art. 1033, as amended by Act April 13, 1892, provides that the Supreme Court, upon the hearing of a case brought up by a writ of error, "may require at any time the original transcript to be sent up:" Held, that the Supreme Court, while not empowered to revise the conclusions of fact of the court of appeals, may consider the evidence, in rendering its decision.—CLARENDON LAND, INVESTMENT & AGENCY CO. v. MCCLELLAND, Tex., 23 S. W. Rep. 1100.

15. ARBITRATION AND AWARD—Submission by Guardian.—A guardian has no power to make a submission to arbitration for his wards when he is interested adversely to them in the subject-matter of the arbitration.—FORTUNE v. KILLEBREW, Tex., 23 S. W. Rep. 976.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS—A firm executed a bill of sale of their goods, notes, accounts, and other assets, in order that the transferee should use the property in the payment of firm debts, for some of which he was liable, because the business had been conducted in his name, and should return the surplus. The transferee subsequently made an assignment of his own and the firm property for the benefit of his creditors: Held that, whether the bill of sale was or was not valid as an assignment for benefit of creditors, the transferee's assignee could not claim title to the firm property as against attaching creditors of the firm.—KELLEY-GOODFELLOW SHOE CO. v. MILLIGAN, U. S. C. C. of App., 58 Fed. Rep. 161.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS—Chattel Mortgages.—Chattel mortgages by an insolvent corporation to secure a portion of its debts are not common-law assignments with preferences, as between creditors, within 2 How. St. Mich. § 8739, declaring such assignments void.—BROWN v. GRAND RAPIDS PARLOR FURNITURE CO., U. S. C. C. of App., 58 Fed. Rep. 286.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Distribution.—Though, after a mortgage has been executed to a trustee to secure the claims of creditors, a portion of one of such claims is paid from property other than that mortgaged, the holder of such claim is still entitled to a dividend from the proceeds of the mortgaged property, based on the whole of his claim, as secured by the mortgage, provided it does not exceed the amount remaining due on his claim.—HIGH v. FIFTH NAT. BANK OF GRAND RAPIDS, Mich., 56 N. W. Rep. 927.

19. ASSIGNMENT FOR BENEFIT OF CREDITORS—Inventory—Trust Funds—Discharge.—The omission by one making an assignment for the benefit of creditors from the inventory of his property of a claim for money which he had received from a lodge, and, after mingling it with his own, loaned as money of the lodge, will not deprive him of the right to a discharge, as the claim was for trust money which did not pass by the assignment.—VAN INGEN v. FELDT, Wis., 56 N. W. Rep. 923.

20. ATTACHMENT—Sufficiency of Levy.—To make and maintain an attachment levy upon personal property, the officer must take such possession as the nature of the property will permit; and an attempted levy by an officer who does not, by himself or another for him, take and retain actual and exclusive control of the property, is invalid.—THROOP v. MAIDEN, Kan., 34 Pac. Rep. 801.

21. BOUNDARIES—Evidence.—Where the issue in dispute is as to the location of the lines of a government survey, proof of a survey made from what is proved to be a copy of the original field notes is admissible, though such copy has not been certified by any competent authority.—ENGLAND v. VANDERMARK, Ill., 35 N. E. Rep. 465.

22. BOUNDARIES — Recognition—Estoppel.—The purchaser of land desiring it to be surveyed, and then conveyed to him by metes and bounds, the son of an adjoining land-owner was employed to make the survey. During the survey the seller and this adjoining land-owner differed as to the running of a certain line, but finally the latter prevailed, and he himself marked the line through the woods. The deed was made by such line, and it was recognized as the boundary for 13 years by such adjoining land-owner: Held, that his heirs were estopped to deny that the line so marked and recognized was the true boundary line.—CHADWELL v. CHADWELL, Tenn., 23 S. W. Rep. 973.

23. BROKERS—Commissions—Contracts.—The owner of property made an oral contract with a broker to negotiate a sale, and subsequently made a written contract therefor: Held, in an action on the oral contract for commissions for a sale to a person sent to the owner, after the written contract had expired and the owner had refused to renew it, that the oral was merged in the written contract, which had expired, and that, the action being on an express contract, recovery could not be had on an implied contract.—NUNN v. TOWNES, Tex., 23 S. W. Rep. 1117.

24. CARRIERS—Passengers—Exemplary Damages.—A passenger ejected by the conductor under circumstances of recklessness and oppression may recover exemplary damages, though the latter acted without malicious intent, and on an honest mistake of fact.—LUCAS v. MICHIGAN CENT. R. CO., Mich., 56 N. W. Rep. 1039.

25. CARRIERS — Passenger — Fragment of Coupon Ticket.—A ticket for a continuous ride over the whole length of a street railway and a connecting line was of a peculiar color and pirnt, and was composed of two coupons, the upper of which was for use on the connecting line, and gave the names of its termini below, and the names of both lines above: Held, that a conductor of the connecting line was bound to accept for passage an upper fragment of the upper coupon, which gave the names of the lines, on the assumption that the conductor of the other line carelessly tore off the part giving the termini, in taking the lower coupon.—ROUSER v. NORTH PARK ST. RY. CO., Mich., 56 N. W. Rep. 937.

26. CARRIERS OF GOODS—Interstate Shipments.—A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in this State, by special contract, limit or relieve itself from this liability. The fact that the contract was for the carriage of goods from a point in this State to a point in another State does not change the rule.—ST. JOSEPH & G. I. R. CO. v. PALMER, Neb., 56 N. W. Rep. 957.

27. CARRIERS OF PASSENGERS—Measure of Damages.—Where it appeared that defendants' train did not stop at plaintiff's destination; that the conductor used rough and insulting language to plaintiff in the presence of his family when asked to go back to their destination; that his conduct was such as would have precipitated a fight but for the interference of a passenger; that plaintiff's conduct was quiet and peaceable,—a verdict of $1,000 was not excessive.—FORDYCE v. NIX, Ark., 23 S. W. Rep. 967.

28. CARRIERS OF PASSENGERS—Negligence.—A cable car stopped short at a power house, where the cables are changed. The windows of the car were broken, and plaintiff, a passenger was thrown forward, broke her right cavicle, and was otherwise injured: Held, that the court properly charged that, if the accident occurred by defect in the roadway or machinery, the law presumed the company negligent, and it must explain the accident.—CLOW v. PITTSBURGH TRACTION CO., Pa., 27 Atl. Rep. 1004.

29. CERTIORARI—Order for Temporary Alimony.—An order for payment of temporary alimony being appealable, and such appeal, with stay bond, furnishing a complete remedy against the enforcement of the order, *certiorari* will not lie to review the action of the court in committing defendant for contempt in disobeying the order; the provision of Const. art. 8, § 3, that the justices of the Supreme Court may issue writs of *certiorari* in proceedings for contempt in the district court, not being intended to apply where there is remedy by appeal.—IN RE FINKELSTEIN, Mont., 34 Pac. Rep. 847.

30. CHATTEL MORTGAGE—Bona Fide Purchasers.—One who purchases personal property with knowledge of a prior, unrecorded mortgage thereon, takes subject to the lien created by such mortgage.—WAGNER v. STEFFIN, Neb., 56 N. W. Rep. 993.

31. CHATTEL MORTGAGES — Lien — Description.—The question in this case being merely whether or not two certain chattel mortgages covered property sold, and the evidence being insufficient to establish the identity claimed, the mortgagee's claim of a lien upon the property is denied.—FIRST NAT. BANK OF MT. PLEASANT v. DAVIS, Neb., 56 N. W. Rep. 975.

32. CITY TAXES—Warrant for Collection—Expiration.—City taxes paid under protest cannot be recovered back merely because the warrant for their collection had expired, and had not been extended.—MINOR LUMBER CO. v. CITY OF ALPENA, Mich., 56 N. W. Rep. 926.

33. CONSTITUTIONAL LAW—Amendment of Act.—Section 422*a* of the Civil Code is not unconstitutional, upon the ground that it is in violation of section 16, art. 2, of the constitution of the State, as it is a new or supplemental act, providing how the cause of action granted by section 422 of the Civil Code, for the benefit of families of persons killed by the wrongful act or omission of another may be enforced, when, the deceased is a nonresident, or when no personal representative has been appointed. Said section is simply a change of remedy, but not the creation of a new cause of action.—BERRY v. KANSAS CITY ETC. R. CO., Kan., 34 Pac. Rep. 805.

34. CONSTITUTIONAL LAW—Revival of Law.—Act Feb. 18, 1893, providing that the grand and petit juries in the county of Wilcox shall be drawn and organized as provided by Code, pt. 5, tit. 3, ch. 4, arts. 1, 2, is unconstitutional, as attempting to revive a law without re-enacting and publishing it at length, as required by Const. art. 4, § 2.—STEWART v. STATE, Ala., 13 South. Rep. 943.

35. CONTRACT — Cancellation—Failure of Consideration.—In an action to cancel a note and a mortgage, it appeared that defendant told plaintiff that the costs in a malicious prosecution suit against him would amount to $200; that plaintiff in such suit would compromise for that amount, which defendant would pay, if plaintiff would execute a note for $200, with mortgage security; that plaintiff executed the note and mortgage for defendant; and that defendant never compromised the suit, or paid any amount in settlement or otherwise: Held, that there was a failure of consideration for the note and mortgage, and that they should be canceled. KRAMER v. WILLIAMSON, Ind., 35 N. E. Rep. 388.

36. CONTRACTS — Consideration.—The assignment of an insurance policy constitutes no consideration for an agreement then made by the assignee, where a mortgage theretofore given by the assignor to the assignee had provided for the obtaining of the policy on the

mortgaged property, and the assignment thereof as further security.—LEWIS v. MCREAVY, Wash., 34 Pac. Rep. 832.

37. CONTRACT—Damages—Aggravation.—The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, which was avoidable by the performance of his duty, falls upon him.—LOOMER v. THOMAS, Neb., 56 N. W. Rep. 973.

38. CONTRACT—Exchange of Property—Rescission.—One cannot, as having been defrauded thereby, rescind an exchange of property, without tendering a return of his property to the other, unless said property is absolutely worthless.—JOHNSON v. FLYNN, Mich., 56 N. W. Rep. 938.

39. CONTRACT—Farming Contract—Interest of Land owner.—A contract by which H was to furnish a farm, tools, team, and feed, and T was to do the work in making a cotton crop, which was to be divided equally between them, gives H a specific interest in the crop, and not merely a landlord's lien.—HORSLEY v. MOSS, Tex., 23 S. W. Rep. 1115.

40. CONTRACTS—Gas Lease—Trespass.—Whether a contract for the exclusive right to bore and maintain gas wells on a tract of land is a license or a lease, or executory or executed, or whether it is a fair one between the parties, cannot be brought into question by a stranger to the contract and trespasser, in an action by the grantee to enjoin him from boring wells.—INDIANAPOLIS NAT. GAS CO. v. KIBBY, Ind., 35 N. E. Rep. 392.

41. CONTRACT — Parol Evidence — Quitclaim Deed.—Where plaintiff accepted a quitclaim deed of land, title to which has failed, he cannot, in an action to recover the price, show a parol agreement that he was to have a warranty deed.—CARTIER v. DOUVILLE, Mich., 56 N. W. Rep. 1045.

42. CONTRACT—Rescission—Fraud.—Upon a bill to rescind a sale of land on the ground of misrepresentations by the vendee as to his ability to pay, it appeared that the purchaser expected certain money, as the seller was informed; that, after the contract was executed, but before the purchaser was put in possession, he informed the seller of his being disappointed in his anticipated receipts of money, that the cash payment required was made, but subsequent payments were not, a draft given by the purchaser being protested; and that the seller, though knowing of the other's failure to realize his expectations, sought to enforce the contract: Held, that there was no evidence of fraudulent representations, although present insolvency was proved; and that the seller's remedy was to ask for specific performance and sale of the property.—CHASE v. MILLER, Va., 18 S. E. Rep. 277.

43. CORPORATE NAME—Exclusive Rights—Injunction.—A corporation known as the "Hygeia Water Ice Company" is not entitled to restrain a corporation subsequently organized as the "New York Hygeia Ice Company, Limited," from the use of the word "Hygeia," where it is not shown that defendant's use of the word ever deceived any one, or caused any confusion as to the identity of the corporations.—HYGEIA WATER ICE CO. v. NEW YORK HYGEIA ICE CO., N. Y., 35 N. E. Rep. 417.

44. CORPORATIONS—Contracts—Officers.—A corporation is estopped to deny the authority of its vice-president to enter into a contract with its creditors under which they are to elect a committee to supervise the corporation's business for five years, where the directors accept and act on the contract, meet with the committee, and carry on the business as specified in the contract.—DALLAS v. COLUMBIA IRON & STEEL CO., Penn., 27 Atl. Rep. 1056.

45. CORPORATIONS—Contracts—Ratification by Directors.—A board of directors of a corporation authorized by its by laws to borrow money and execute securities therefor may ratify the unauthorized execution of a promissory note by the secretary of the corporation for money borrowed, and thus bind the corporation.—NEBRASKA & K. FARM LOAN CO. v. BELL, U. S. C. C. of App., 58 Fed. Rep. 326.

46. CORPORATIONS—Leases—Construction.—A corporation which leases all the property and franchises of another corporation, agreeing to pay all taxes assessed upon "the real and personal property, franchises, capital stock, or gross receipts" thereof, is not bound to pay a tax levied on "dividends," under a statute existing at the date of the lease.—JERSEY CITY GAS-LIGHT CO. v. UNITED GAS IMP. CO., U. S. C. C. of App., 58 Fed. Rep. 323.

47. CORPORATIONS—Stock—Right to Vote.—Under a contract of present sale of stock, in accordance with which it is delivered to a third person in escrow, the seller retaining a contingent right to resume title on failure of the purchaser to comply with terms of the sale, the right to vote the stock while the contract remains executory being expressly given to the purchaser, the seller has not the right to vote, by reason of Act May 7, 1889 (P. L. 102), making the certificates of stock and transfer books of corporations *prima facie* evidence of the right to vote the stock.—COMMONWEALTH v. PATTERSON, Penn., 27 Atl. Rep. 998.

48. CRIMINAL EVIDENCE—Admissions of Third Person.—On a trial for larceny, evidence that a person other than defendant admitted that he stole the goods is hearsay.—STATE v. HACK, Mo., 23 S. W. Rep. 1086.

49. CRIMINAL EVIDENCE — Embezzlement. — On a prosecution for embezzlement, evidence that defendant, two months after the offense charged in the information embezzled another sum of money from defendant, is not admissible to show his intention in taking the the first sum.—PEOPLE v. HILL, Cal., 34 Pac. Rep. 854.

50. CRIMINAL EVIDENCE — Homicide — Res Gestæ.—During a struggle between defendant and deceased in a house to which defendant come to arrest deceased and another persons the fatal wound was given: Held, on prosecution for the homicide, that the shooting of defendant at the other person outside the house, where such person followed defendant a few minutes after the homicide, was not part of the *res gestæ*.—PEOPLE v. LANE, Cal., 34 Pac. Rep. 856.

51. CRIMINAL EVIDENCE—Homicide—Threats.—In a prosecution for murder, the defendant will not be allowed to show the dangerous character of the deceased, or threats by him, unless a hostile demonstration by the deceased has first been proven.—STATE v. CARTER, La., 14 South. Rep. 30.

52. CRIMINAL LAW—Assault—Arrest.—Generally, the killing of an officer or other person to prevent an illegal arrest is not murder, but manslaughter. Consequently, shooting at him for the same purpose without killing him, is *prima facie* not an assault with intent to murder.—THOMAS v. STATE, Ga., 18 S. E. Rep. 305.

53. CRIMINAL LAW—Assault—Teacher and Pupil.—A warrant against a school teacher charging that he did unmercifully whip a child inflicting bruises on her person, sufficiently charges a battery, without setting out the *quo animo*, which could be shown by way of avoidance if it were pleaded in defense that the parties were teacher and pupil.—STATE v. STAFFORD, N. Car., 18 S. E. Rep. 256.

54. CRIMINAL LAW—Bail.—In fixing the amount of bail, the court or judge may take into consideration the nature of the offense; the penalty which the law authorized to be inflicted, should there be a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition; and the circumstances surrounding the case.—IN RE SCOTT, Neb., 56 N. W. Rep. 1009.

55. CRIMINAL LAW—Burglary—Dwelling House.—The fact that defendant slightly raised the window in the day-time, so that the bolt which fastened it down

would not be effectual, would not divest his subsequent breaking and entering through the window in the night-time of the character of burglary.—PEOPLE v. DUPREE, Mich., 56 N. W. Rep. 1046.

55. CRIMINAL LAW—Continuance.—Defendant, a few days before trial, issued a summons for a witness, who resided in the same town, to be delivered to the sheriff. The summons was returned "not found." Defendant made affidavit to the meteriality of the witness, and the necessity for his presence at the trial. The court overruled the motion for continuance upon the sole ground that the statement of the prisoner under oath were not to be credited: Held, error.—WELSH v. COMMONWEALTH, Va., 18 S. E. Rep. 272.

57. CRIMINAL LAW — False Pretenses — Intent.— On trial for violation of Pen. Code, § 532, which denounces as a criminal "every person who knowingly and designedly, by false or fraudulent representations, defrauds any other person of property," it is no defense that defendant had no intent to defraud when he obtained goods by false representations, but fully intended to pay for the goods, and felt sure of his ability to do so when the bill would become due.—PEOPLE v. WEIGER, Ga., 34 Pac. Rep. 826.

58. CRIMINAL LAW — Forgery — Instructions.— On a trial for forgery, an instruction that if the jury believe certain circumstances to have been clearly shown, such circumstances strongly indicate the commission of the crime charged, is fatally erroneous, in that the jury are directed what weight they shall give the evidence in making up their verdict.—BOYER v. STATE, Tenn., 23 S. W. Rep. 971.

59. CRIMINAL LAW—Homicide.—To sustain a conviction for murder, or manslaughter, the *corpus delicti* must be established beyond a reasonable doubt; and where the circumstances relied on to prove that death was caused by the criminal act of a person other than the deceased are consistent with the theory that death was produced by natural causes, there is failure of proof.—DREESSEN v. STATE, Neb., 56 N. W. Rep. 1024.

60. CRIMINAL LAW—Larceny — Principal and Accessory.—An accessory before the fact is one who, though absent at the time of the commission of a felony, does nevertheless procure, counsel, command, or abet another to commit such felony. An accessory after the fact is one who, with knowledge that a felony has been committed by another, aids, relieves, comforts, or assists the felon, whether he be a principal or an accessory before the fact. A principal in the second degree is one who is present, aiding and abetting, at the commission of a felony.—ALBRITTON v. STATE, Fla., 18 South. Rep. 955.

61. CRIMINAL LAW—Manslaughter.—Manslaughter in the fourth degree being the intentional killing of a human being in the heat of passion, on a reasonable provocation, without malice, and without premeditation, and under circumstances that will not render the killing justifiable, or the voluntary killing of another by a weapon or by means neither cruel nor unusual, in the heat of passion, in any case other than justifiable homicide,—where two persons ran together to the scene of a fight, and one of them, shouting, "Shoot them down!" threw a club at a person present, which knocked him down, and the other grabbed him as he attempted to rise, and struck him, the two may be equally guilty, though the blow which caused death was that received from the club first thrown.—STATE v. HERMANN, Mo., 23 S. W. Rep. 1071.

62. CRIMINAL LAW — Murder—Accomplices.—An instruction which assumes that an accomplice who is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it is not necessary for the accomplishment of the purpose, is equally guilty as if he had actually participated, is erroneous, when there is no evidence of any previous conspiracy to commit the murder.—HICKS v. UNITED STATES, U. S. C. C., 14 S. C. Rep. 144.

63. CRIMINAL LAW—Reasonable Doubt.—In a criminal case the court charged the jury that "this man is presumed to be innocent until he is proven guilty. There is about him that presumption, and it attaches to the entire case. The burden is on the people to prove his guilt beyond a reasonable doubt, and all of the jury must be satisfied beyond a reasonable doubt in order to convict:" Held, to be all the law requires, and the refusal of a further instruction on the same subject was proper.—PEOPLE v. CURTIS, Mich., 56 N. W. Rep. 925.

64. CRIMINAL PRACTICE—Enticing Servants.—Under Code 1892, § 1068, providing that one who shall willfully entice away, knowingly employ, or induce a laborer who has contracted with another for a specified time to leave his employer before the expiration of his contract, without the consent of his employer, shall be liable to fine, an affidavit alleging the enticing away and employment of a person who had contracted with another fails to charge an offense where it omits to state that the person enticed away was a laborer, or that the matter complained of was without the consent of the employer.—JACKSON v. STATE, Miss., 13 South. Rep. 935.

65. CRIMINAL PRACTICE — False Pretenses — Indictment.—An indictment under Rev. St. 1889, § 3564, providing that one who, with intent to defraud another, shall by false pretense obtain the signature of any person to a written instrument, shall be punished as for stealing the property or thing so obtained, which alleges that defendant, with intent to defraud C of a certain lot, by false pretenses obtained of him the execution of a deed and all his interest in the lot, is not double, the gist of the offense being the obtaining of the signature, and the allegations as to the property being surplusage.—STATE v. FLANDERS, Mo., 23 S. W. Rep. 1086.

66. CRIMINAL PRACTICE — Homicide — Indictment.—Where the concluding part of an indictment for murder states merely that the accused, "him, the said—, in manner and form aforesaid, did kill and murder," etc., omitting "by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought," it is fatally defective.—STATE v. RECTOR, Mo., 23 S. W. Rep. 1074.

67. CRIMINAL PRACTICE—Murder—Indictment.—It is not error to overrule a motion for a third continuance on the ground of the absence of material witnesses, if defendant has not used proper diligence in trying to obtain their depositions or attendance.—STATE v. BANKS, Mo., 23 S. W. Rep. 1079.

68. CRIMINAL PRACTICE—Selling Mortgaged Property.—In an indictment for the selling or transferring of mortgaged personal property, it is necessary to allege the name of the person or corporation to whom such sale or transfer was made.—STATE v. HUGHES, Neb., 56 N. W. Rep. 982.

69. CRIMINAL TRIAL—Jury.—A juror is not disqualified to serve on a trial for robbery by the fact that he was a juror on a former prosecution in which defendant was convicted of maiming, the record of which was, without objection, read in evidence on the trial for robbery.—STATE v. MALONEY, Mo., 23 S. W. Rep. 1084.

70. CRIMINAL TRIAL—Murder—Competency of Jurors.—Under Rev. St. 1889, § 4197, declaring it a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried, but providing that, if such opinion is founded only on rumor and newspaper reports, and not such as to bias the juror's mind, he may be sworn, jurors who have read in newspapers what "purported" to be the evidence taken at the coroner's inquest, and what "purported to be" defendant's confession of the crime for which he is being tried, are competent.—STATE v. ROBINSON, Mo., 23 S. W. Rep. 1067.

71. DEED — Sheriff's Deed — Action to Cancel. — A sheriff's deed, after sale on an execution issued on a justice's judgment, should not be canceled on the ground that the judgment debtor was not served in the

action in which the judgment was rendered, where the return shows personal service, the officer making it testifies that service was made as returned, and the justice testifies that on return day such debter told him he had no defense to the action, and to enter judgment, and where the only evidence that it was not served is given by such debtor. — QUARLES v. HIERN, Miss., 14 South. Rep. 23.

72. DEEDS—Execution—Undue Influence. — After the execution of a deed to his wife, and her subsequent death, the grantor, as guardian of her children, treated the land as theirs; asked lawyers if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so: Held that, even if the deed was obtained by undue influence, there was a ratification of it.—ELLIS v. ELLIS, Tex., 23 S. W. Rep. 996.

73. DEED TO CATHOLIC BISHOP—Title. — A deed to a bishop of the Roman Catholic Church for the benefit of the church, "and to his successors and assigns forever," vests a fee simple title in such bishop, in trust for the church, in the absence of any conditions subsequent, either expressed or implied.—GABERT v. OLCOTT, Tex., 23 S. W. Rep. 985.

74. DIVORCE—Alimony Pendente Lite. — Alimony or allowance for expenses will not be allowed in an action for divorce by one claiming to be a wife when marriage in fact is denied by the answer, until the existence of the marital relation is presumptively proven to the satisfaction of the court, or is admitted. The court is not limited to the allegations of the complaint and the denials of the answer. If other legitimate proofs are submitted, which make out, in the judgment of the court, a fair presumption of the fact of marriage, it has the power to make the allowance.—BARDIN v. BARDIN, S. Dak., 56 N. W. Rep. 1069.

75. DOWER — Devise in Lieu — Election. — A widow should be allowed to revoke an election to take under her husband's will, where there are no elements of estoppel, and it is sought to be revoked within the statutory period allowed for election to take under the law, and where the evidence shows that she did not reasonably understand the effect of her election. — GARN v. GARN, Ind., 35 N. E. Rep. 394.

76. ELECTIONS—Local Option — Publication.—Where, after publishing an order declaring the result of a local option election for three successive weeks, further publication is stopped by a temporary injunction, and after the order is dissolved the order is published for another week, such publication is not a publication for "four successive weeks," within Rev. St. art. 3234, requiring the court to have published for "four successive weeks," the order declaring the result of the election.—MCDANIEL v. STATE, Tex., 23 S. W. Rep. 989.

77. ELECTIONS — Numbering Ballots. — Under Const. art. 6, § 4, relating to elections, and directing the legislature to provide for the numbering of ballots, the legislature enacted Rev. St. arts. 1694, 1697, which, respectively direct a judge of election to write the voter's poll-list number on the ballot, and forbid the counting of an unnumbered ballot: Held, that article 1694, is mandatory and that article 1697 is binding on the courts, as well as the officers of election. — STATE v. CONNOR, Tex., 23 S. W. Rep. 1103.

78. EQUITY—Contract Lien. — An agreement made with a prospective creditor of a mercantile firm by one who has loaned bonds to it that such bonds, "or the value thereof," shall not be returned to him until any money owing to such creditor shall be paid, and that the bonds, "or the value thereof," shall remain at the risk of the firm's business so far as any claim of such creditor is concerned, does not create a lien on the bonds themselves, for the owner has a right to take them back at any time by paying their value into the firm; and hence the taking of them back without leaving their value is a mere breach of contract, for which the proper remedy is damages at law, and a bill in equity will not lie to subject the bonds or their proceeds to the creditor's debt.—WALKER v. BROWN, U. S. C. C. (Iowa), 58 Fed. Rep. 23.

79. EQUITY—Reformation of Contracts.—To entitle a party to have a written contract reformed the complaint must show that some relation of trust and confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions were not equally accessible to both parties.—KLEINSORGE v. ROHSE, Oreg., 34 Pac. Rep. 873

80. EQUITY PLEADING—Answer as Cross Bill.—Under rule 123, providing that a defendant may have all the benefits of a cross bill on an answer containing the proper averments and prayers, a general replication does not traverse a cross claim alleged in the answer, and defendant has a right to enter a default thereon, which may, however, be opened on a proper showing, at the court's discretion.—COACH v. ADSIT, Mich., 56 N. W. Rep. 937.

81. ESTOPPEL. — Mere knowledge by the owner of land of the existence of a forged title on the records of the county in which the land is situated, and delay in asserting his right, will not constitute an estoppel, in the absence of evidence by the person claiming the estoppel of some affirmative act of the owner, or an omission of some duty devolving upon him.—CHAMBERLAIN v. SHOWALTER, Tex., 23 S. W. Rep. 1017.

82. EVIDENCE — Declaration—Pedigree.—A son may testify to declarations made by his mother, since deceased, as to her father's family, the number of his children, the date of his death and that of some of the children, where there are deeds in evidence showing the relationship of declarant to her father.—DE LEON v. MCMURRAY, Tex., 23 S. W. Rep. 1038.

83. EXECUTION — Exemptions—Horses.—By the provisions of section 530 of the Code of Civil Procedure, a debtor resident of this State, the head of a family, and in the business of agriculture, is entitled to select and hold as exempt from execution "a pair of horses;" and he may exercise his own discretion in the selection of such horses, and is not limited to any particular horses, but may make such selection from any horses owned by him.—CONWAY v. ROBERTS, Neb., 56 N. W. Rep. 980.

84. FEDERAL COURTS — Jurisdiction—Citizenship.—A Federal Court has jurisdiction, without regard to the citizenship of the parties, of a supplemental and ancillary bill to carry into effect its own previous decree removing a cloud from title, and declaring the title to be vested in complainant's predecessor in interest and estate; and, although defendant is in possession, the suit will not be dismissed on the ground of an adequate remedy at law.—ROOT v. WOOLWORTH, U. S. S. C., 14 S. C. Rep. 136.

85. FEDERAL COURTS — Jurisdiction — Citizenship.—A suit to foreclose, brought by an alien railroad mortgage bondholder in his own right, is maintainable in a Federal Circuit Court, although the trustee under the mortgage, who holds the legal title, is a citizen of the same State with some of the defendants; such suit being in hostility to the trustee, who refuses to act, and who is made a party defendant. Under such circumstances, the court will not look behind the parties to the record.—REINACH v. ATLANTIC & G. W. R. Co., U. S. C. C. (Ohio), 58 Fed. Rep. 33.

86. FEDERAL COURTS—Supreme Court—Federal Question.—A decision by the highest court of a State that the acceptance of a dividend on a note in composition proceedings under the State insolvency laws is a waiver of any right to enforce the debt after the debtor's discharge is broad enough to dispose of the case, without reference to any federal question, and a writ of error to the United States Supreme Court cannot be supported on the ground that the insolvency statutes, having been enacted after plaintiff received his note, impaired the obligation thereof.—EUSTIS v. BOLLES, U. S. S. C., 14 S. C. Rep. 131.

87. FEDERAL COURTS—Supreme Court.—The Supreme Court of the United States is to judge for itself of its

own jurisdiction to review the judgment of a State Supreme Court; and, while a certificate of the presiding judge of the State court as to the questions decided is always regarded with respect, it cannot confer jurisdiction.—POWELL v. SUPERVISORS OF BRUNSWICK COUNTY, U. S. S. C., 14 S. C. Rep. 166.

88. FEDERAL COURTS—Supreme Court—Jurisdiction.—The provisions of Rev. St. §§ 764-766, allowing appeals from the Circuit Courts directly to the Supreme Court in all cases of *habeas corpus*, were repealed by the judiciary act of March 3, 1891, but the right of direct appeal in *habeas corpus* proceedings still exists in the cases designated in section 5 of that act; and upon such appeals the act of March 3, 1893, (27 Stat. 751), amending Rev. St. § 766, so as to require appeals thereunder to be taken within six months, may operate.—EX PARTE LENNON, U. S. S. C., 14 S. C. Rep. 123.

89. FIXTURES—Landlord and Tenant.—A new stairway erected by a tenant in place of an old one removed by him is a fixture, which he cannot remove on the termination of the lease, in the absence of an agreement with the landlord giving him the right; and hence the landlord's refusal to permit such removal does not render him liable to the tenant for the value of stairway.—BOVET v. HOLZGRAFT, Tex., 23 S. W. Rep. 1014.

90. FORCIBLE DETAINER—Summary Remedy.—Under Act 1886, ch. 470 (Code, art. 53, §§ 4-6), providing for dispossession of a tenant by a proceeding before a magistrate without the aid of a jury, and making such proceeding applicable, as far as possible, to cases of forcible entry and detainer, a justice of the peace may, after summons and due proof, enter a judgment for restitution without the inquisition of a jury first found, and may issue his warrant to the sheriff, commanding him to dispossess the person who forcibly detains the property of another.—CLARK v. VANNORT, Md., 27 Atl. Rep. 982.

91. FRAUDS, STATUTE OF—Guaranty—Consideration.—The fact that no contemporaneous consideration passed from a creditor to a guarantor of the payment of a claim against a third person is immaterial, under the Rhode Island statute of frauds, where, on the faith of the guarantor's parol promise to pay the debt, the creditor subsequently discharged a mortgage held by him against the original debtor to secure the claim, and also an attachment which he had sued out against the debtor's property.—ALDRICH v. CARPENTER, Mass., 35 N. E. Rep. 456.

92. FRAUDULENT CONVEYANCES—Husband and Wife.—The fact that one conveys a large portion of his property, without valuable consideration to his wife, knowing at the time that his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors.—THRELKEL v. SCOTT, Cal., 34 Pac. Rep. 850.

93. FRAUDULENT CONVEYANCE—Innocent Purchaser.—On the day that executions were levied upon land in the possession of the judgment debtor under an executory contract of sale, his vendor declared the contract forfeited, as he had a legal right to do, under the contract, and conveyed the land to the debtor's wife, who immediately mortgaged it for a sum larger than the balance due the vendor: Held, that an innocent purchaser of the mortgage note before maturity was not chargeable with constructive notice that the transaction was entered into for the purpose of defrauding the judgment creditors.—PECK v. DYER, Ill., 35 N. E. Rep. 479.

94. FRAUDULENT CONVEYANCES—Mortgage.—In a contest between the mortgagee of an insolvent debtor and other creditors who attack the mortgage as fraudulent, acts and declarations of the debtor tending to prove fraudulent intent and motive on his part may be received in evidence for this purpose only, though such acts and declarations were subsequent to the execution, or even to the foreclosure, of the mortgage. They would, however, not affect the mortgagee without some evidence to connect him with the fraud of the mortgagor at or prior to the execution of the mortgage, either by actual participation or by having notice or grounds for reasonable suspicion.—CLAFLIN v. BALLANCE, Ga., 18 S. E. Rep. 309.

95. FRAUDULENT CONVEYANCES—Preferring Creditors.—A debtor in failing circumstances has a right to secure or pay in full a portion of his creditors, to the exclusion of others, and whether in so doing he is actuated with a fraudulent purpose is a question of fact, and not of law.—JOHN V. FARWELL CO. v. WRIGHT, Neb., 56 N. W. Rep. 984.

96. FRAUDULENT REPRESENTATION — Exchange of Property.—In a suit to set aside an exchange of land, where the bill is evidently framed on the theory that the complainant was induced to make the exchange by the fraudulent representations of defendant's agent as to the nature of the soil, a further allegation that defendant refused to carry out a part of the agreement in regard to purchasing complainant's personal property does not change the character of the bill.—STEVENS v. THOMPSON, Mich., 56 N. W. Rep. 1041.

97. GARNISHMENT—Service of Writ.—Under Code 1892, § 2134, providing that writs of garnishment shall be served as a summons is required by law to be executed, and section 3417, providing that summons shall be executed five days before the return day thereof, and shall then require the appearance of the party at the term next after that to which it is returnable, a service of a writ of garnishment only two days before the return day cannot support a judgment against the garnishees at the return term.—ALEXANDER v. LLOYD, Miss., 14 South. Rep. 22.

98. GUARANTY—Continuance—Release.—Plaintiff having agreed to employ M as a salesman, and requiring a bond from him, defendants, at M's request, gave plaintiff a paper guarantying payment of all moneys collected by M, and all indebtedness of M, as per agreement between plaintiff and M. Plaintiff then signed an agreement with M for one year, or less, at plaintiff's option. M worked for plaintiff three years, and then left, owing it a considerable balance: Held, that defendants were only liable for such part of the deficiency as had occurred during one year.—JOHN A. TOLMAN CO. v. CLEMENTS, Mich., 56 N. W. Rep. 1038.

99. HIGHWAYS—Obstructions.—When a private person or corporation constructs a ditch or canal across a public highway, this gives them no right to destroy it as a thoroughfare, but they are bound both by the common law and the statute to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage, and keep the same in good repair. This obligation is the same whether the canal or ditch cuts the highway or street within or without the limits of a city or village.—CITY OF LEWISTON v. BOOTH, Idaho, 34 Pac. Rep. 809.

100. HOMESTEAD—Conveyance by Judgment Debtor.—An insolvent judgment debtor may sell and convey his homestead unaffected by such judgment.—POLLOCK v. MCNEIL, Ala., 13 South. Rep. 937.

101. HUSBAND AND WIFE — Community Property.—Pension money paid to a veteran in the Civil War is a donation from the government, and is his separate property, though he did not receive it until after his marriage; and the fact that he invested it in land does not change its character into community property.—JOHNSON v. JOHNSON, Tex., 23 S. W. Rep. 1022.

102. HUSBAND AND WIFE—Homestead.—Under Gen. St. § 1397, empowering a husband to dispose of his separate property by will or otherwise, as though unmarried, Code Proc. § 972, providing that a widow shall be entitled to remain in possession of the homestead, and if the head of the family in his life-time did not comply with the provisions for acquiring a homestead, she may do so, and shall on such compliance be entitled to a homestead, and the same shall be set aside for her use, does not authorize the setting apart for

use of the widow of a homestead out of the separate property of the husband, which he had disposed of by will, and which he had in no manner selected as a homestead.—IN RE EYRES' ESTATE, Wash., 34 Pac. Rep. 831.

103. HUSBAND AND WIFE — Medical Attendance.—A husband who has means being declared liable by Civil Code, § 174, for his wife's support, her estate should not be charged with the expense of doctors, nurses, and medicines obtained by him for her in her last illness.—IN RE WERINGER'S ESTATE, Cal., 34 Pac. Rep. 825.

104. INDORSEMENT — Maturity.—A note signed by three as makers was secured by a trust deed by only two of them, conditioned that on default in the interest the whole principal should at once mature, notwithstanding anything in the notes. The payee being also beneficiary of the deed, indorsed over the note and assigned the deed. Default in interest was made, and the deed foreclosed before the maturity expressed in the note: Held that, since the third maker was no party to the deed, and so not yet in default on the note, the indorser's estate could not be sued on the note for the deficiency.—HEISLER V. LYON, Colo., 34 Pac. Rep. 841.

105. INJUNCTION — Enjoining Trespasses.—A preliminary injunction will be granted to restrain city authorities, in opening a street, from the removal of a fence, building, and tracks of a railroad from wharf property necessarily connected with the railroad system in its State and interstate business, since such removal constitutes a trespass which goes to the destruction of the property in the character in which it is enjoined by the railroad company.—SOUTHERN PAC. R. CO. V. CITY OF OAKLAND, U. S. C. C. (Cal.), 58 Fed. Rep. 50.

106. INJUNCTION — Mining Claims.—In the Federal Courts an interlocutory injunction may be granted, restraining the mining of valuable ores pending an action at law to determine the legal title, when such title is in dispute.—ST. LOUIS MINING & MILLING CO. OF MONTANA V. MONTANA MINING CO., U. S. C. C. (Mont.), 58 Fed. Rep. 129.

107. INJUNCTION—Trespass.—As a general rule, two conditions must concur, to give a court of equity jurisdiction to enjoin a mere trespass on property: First, the complainant's title must be admitted, or legally established; and, second, the trespass must be of such a nature as to cause irreparable damage, not susceptible of complete pecuniary compensation. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such cases, for the reason that a legal remedy has been devised to redress such wrongs, and, so long as this remedy is adequate, equity has no right to interfere.—CARNEY V. HADLEY, Fla., 14 South. Rep. 4.

108. INSOLVENCY—Conflict of Laws.—A foreign statute providing that a voluntary assignor may on compliance therewith be discharged from his debts; that every creditor who shall accept a dividend out of the estate, or in any way participate in the proceedings, shall be bound by any order or discharge granted by the court (subject to the right of appeal); that nonparticipating creditors are debarred from receiving anything out of the assigned estate unless a surplus remain,—is coercive in its nature, and therefore a voluntary assignment made thereunder does not convey personal property in New York against subsequently attaching creditors.—BARTH V. BACKUS, N. Y., 35 N. E. Rep. 425.

109. INTOXICATING LIQUORS — Unlawful Sale.—On a prosecution for the unlawful sale of liquor, evidence of sales other than that charged in the indictment is inadmissible.—WARE V. STATE, Miss., 13 South. Rep. 936.

110. JUDGMENT — Infant Defendants.—A judgment against infant defendants not served or cited, though represented by a guardian *ad litem*, will not stand on appeal or writ of error, this being a direct attack.—MOORE V. PRINCE, Tex., 23 S. W. Rep. 1113.

111. JUDGMENT — Record — Priorities.—In Texas a judgment lien takes precedence of a prior, unrecorded deed by the judgment debtor, unless the judgment creditor has notice thereof.—VON STEIN V. TREXLER, Tex., 23 S. W. Rep. 1047.

112. JUDGMENT—Service of Summons.—On motion to set aside a judgment by default, it appeared that the deputy sheriff who returned the summons as served did not serve it himself, but delivered it to a third person to serve, and that the latter admitted to defendant, the day before the hearing of the motion, that he did not serve it, though the next day he testified that he did so. Defendant testified positively that he was not served: Held, that the return should be quashed, and the judgment set aside.—COULBOURN V. FLEMING, Md., 27 Atl. Rep. 1041.

113. JUDGMENT — Set-off. — A judgment debtor is entitled to off-set against the judgment a claim against the judgment creditors which was not due when the action was brought, but which matured after the judgment creditors had become insolvent, and before judgment was finally rendered against the debtor on appeal in the Supreme Court, where he was unable to plead the off-set, owing to its lack of original jurisdiction.—ELLIS V. KERR, Tex., 23 S. W. Rep. 1050.

114. JUDICIAL SALES—Order for Resale.—Where the decretal order for a sale of land fixes the date thereof, a sale made at any other time is unauthorized and void.—TOMPKINS V. TOMPKINS, S. Car., 18 S. E. Rep. 233.

115. LANDLORD AND TENANT — Acceptance of Lease—Estoppel.—Where one in possession of land accepts a lease, he is estopped to deny his lessor's title, as though he had taken possession under the lease. — DIXON V. STEWART, N. Car., 18 S. E. Rep. 325.

116. LANDLORD AND TENANT—Disavowal—Possession.—Where a tenant for years disavows his tenancy by conveying the leased land by deed in fee-simple, the landlord has the right to protect his title by regaining possession without waiting for the termination of the lease.—TRUSTEES OF WADSWORTHVILLE POOR SCHOOL V. JENNINGS, S. Car., 18 S. E. Rep. 258.

117. LANDLORD AND TENANT—Estoppel.—In an action of ejectment by a lessee against his sublessee and one who has acquired possession through collusion with the sublessee, the plaintiff need not prove his compliance with the terms of his lease, since the defendants are estopped from denying his title.—SEXTON V. CARLEY, Ill., 35 N. E. Rep. 471.

118. LANDLORD AND TENANT—Leases.—A provision in a lease giving the lessee the right to repair and deduct cost from the rent will bind a subsequent grantee, though the lease is by parol. — MITCHELL V. MCNEAL, Colo., 34 Pac. Rep. 840.

119. LANDLORD AND TENANT — Lease — For Rent.—A lease of a brickyard provided that after the first quarter's rent became due the lessees should keep in the yard brick sufficient to pay one quarter's rent, and if the rent was not paid the lessor might either re-enter, or sell brick enough to pay the rent due: Held that, where a mortgagee of the brick in the yard paid the rent for the quarter in which the mortgage was taken, such mortgage was a prior lien to a claim for rent thereafter accruing. — BLEAKLEY V. SULLIVAN, N. Y., 35 N. E. Rep. 433.

120. LANDLORD AND TENANT—Oral Lease — Statute of Frauds.—Where an oral lease of a farm in Michigan is made in the spring for one year, and provides that the tenant may sow it all to wheat, the contract cannot be performed within a year, because of the implied right of the tenant to enter and reap the crop three months after the expiration of the lease, and it is void.—CARNEY V. MOSHER, Mich., 56 N. W. Rep. 935.

121. LANDLAND AND TENANT—Repairs by Tenant.—In an action by a tenant against his landlord for repairs made by him upon the leased premises he must show a contract of the landlord, express or implied, to pay

for the same, to entitle him to recover. — POWELL v. BECKLEY, Neb., 56 N. W. Rep. 974.

122. LIEN—Purchase Money.—One supplying pumping engines for water-works may, by express agreement, retain a lien on the engines, for their price, after they are affixed to the company's premises.—WOOD v. HOLLY MANUF'G CO., Ala., 13 South. Rep. 948.

123. LIFE INSURANCE—Suicide—Insanity.—An exemption of "Suicide. The self-destruction of the assured, in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of assured,"—does not prevent liability for an intentional self-killing when the reasoning faculties are so far impaired by insanity as to be incapable of understanding the moral character of the act, even though appreciating its physical nature and consequences.— CONNECTICUT MUT. LIFE INS. CO. OF HARTFORD v. AKENS, U. S. S. C., 14 S. C. Rep. 155.

124. MALICIOUS PROSECUTION — Wrongfully Ousting Tenant.—One who, by written contract, lets premises to another for one year, with a privilege of renewal for two years longer, admits the tenant into possession, and at the expiration of the first year sues out a summary statutory process maliciously and without probable cause to dispossess the tenant as a tenant at will holding over is liable to an action for malicious prosecution of a civil proceeding, if any special damage to the tenant is occasioned thereby.—SLATER v. KIMBRO, Ga., 18 S. E. Rep. 296.

125. MANDAMUS TO COURT—Appeal.—*Mandamus* cannot be invoked for the purpose of correcting error committed by a court or other tribunal exercising judicial functions.—STATE v. HOLMES, Neb., 56 N. W. Rep. 979.

126. MARRIED WOMAN— Transfer of Separate Property.—Where a woman consents to the transfer of her separate estate to her husband, and its investment in a certain manner, she cannot avoid the transaction on the ground of ignorance of the law affecting the subject.—OSBURN v. THROCKMORTON, Va., 18 S. E. Rep. 284.

127. MARRIED WOMAN—Wife as Feme Sole Trader.—Code, § 2350, prescribing that a husband's consent to his wife's acting as a *feme sole* trader shall be in writing, signed by him, and filed with the probate judge, since it does not expressly require acknowledgment, entitles to record such paper unacknowledged, and invests a certified copy of it with like faith and credit as copies of acknowledged instruments so filed.—SCHWARTZ v. BAIRD, Ala., 13 South. Rep. 947.

128. MASTER AND SERVANT—Assumptions of Risks.—A factory employee impliedly assumes the risk of accidents arising from a wet and slippery floor and from an exposed pully near which he is set to work, since such condition is open and obvious; and he cannot recover from the master for injuries sustained through these causes, where the condition of the floor and of the pully was the same when he entered defendant's service as it was at the time of the accident.—KLEINEST v. KUNHARDT, Mass., 35 N. E. Rep. 462.

129. MASTER AND SERVANT—Dangerous Machinery.—Evidence.—In an action for personal injuries sustained by plaintiff, an employee of defendant, alleged to have been caused by the absence of guards from a planer used in defendant's mill, the admission of evidence that planers in other mills were protected by guard's to show defendant's neglect in failing to furnish his planer with a guard, and that such protection was usual, was within the discretion of the court. — VEGINAN v. MORSE, Mass., 35 N. E. Rep. 451.

130. MASTER AND SERVANT—Defective Appliances.—The rule exempting a master from liability for injuries caused to a servant by a fellow-servant is subject to the exception that the master is bound to use due care in furnishing safe instrumentalities for performing the work, and is liable for an omission to fulfill his obligation, although it arises from the negligence of a coservant of the person injured.— GARDNER v. MICHIGAN CENT. R. CO., U. S. S. C., 14 S. C. Rep. 140.

131. MASTER AND SERVANT—Fellow-servants— Train Dispatcher and Engineer.— A train dispatcher, who controls the movement of trains, represents the company, and is not the fellow-servant of an engineer injured in a collision resulting from his negligence.— LITTLE ROCK & M. R. CO. v. BARRY, Ark., 23 S. W. Rep. 1097.

132. MASTER AND SERVANT— Injuries to Employee—Vicious Animal.—Where a master, a corporation, furnished a horse for the use of its servant in the line of his employment, wherein said horse injured the servant, the jury were properly instructed that, even if they should find that the horse was vicious and dangerous, still that the plaintiff could not recover unless the jury further found from the testimony that the master, through its managers or officers, knew, or by the exercise of proper care and diligence might have known, of the vicious and dangerous character of the horse.—GEORGE H. HAMMOND CO. v. JOHNSON, Neb., 56 N. W. Rep. 967.

133. MASTER AND SERVANT—Injury—Voluntary Services.—Plaintiff's son, a minor, was employed by defendant railway company, with plaintiff's consent. While on a train with a message, at the request of the defendant's yard foreman, he attempted to uncouple a car, and was injured. He was under no obligation to obey the foreman: Held, that he was a mere volunteer, and could not recover.—TEXAS & N. O. RY. CO., v. SKINNER, Tex., 23 S. W. Rep. 1001.

134. MASTER AND SERVANT—Who is Master.—Plaintiff was injured by the dumping of coal through a hatchway in a shed without warning, while at work therein. M testified that he dumped the coal, was employed by C, and was sent by C's foreman to discharge the coal from a lighter: Held, insufficient to show employment by C, where C testified that he was treasurer and manager of a lighterage company; that M was sent by the company to work for defendant company; and that the bill, though paid in the first instance by the lighterage company, was finally paid by defendant company; M further testifying that he did not know whether C or the lighterage company paid for the work.—FLYNN v. CAMPBELL, Mass., 35 N. E. 453.

135. MECHANICS' LIENS — Contract by Tenant.—The mechanic's lien law requires that a contract for material, labor, etc., for the improvement of real property shall be made with the owner thereof, or his agent. A tenant, as such, has no power to contract for labor or material so as to affect with a mechanic's lien the real property leased to him.—WATERMAN v. STOUT, Neb., 56 N. W. Rep. 987.

136. MINES AND MINING — Leases.— A lease of coal lands reserved to the lessor and his assigns the joint use of such portions of the leased lands as might be necessary for roads, railways, water ways, side tracks, and other structures necessary for the profitable working of adjacent coal lands of the lessor and his assigns, but not so as to injuriously interfere with the workings of the lessee: Held, that the lessee might enjoin the making of an entry through and under his land for the purpose of mining coal on adjacent leased land where the weight of evidence showed that the coal in the adjacent lands could be mined profitably without such entry, though not so profitably or so conveniently as with it.—RELIANCE COAL & COKE CO. v. KENTUCKY COAL & COKE CO., Tenn. 23 S. W. Rep. 1095.

137. MINES AND MINING — Overlapping Locations.— Mere failure during one year to perform the annual development work required by Rev. St. § 2324, does not divest title to a Colorado mining claim in favor of a junior overlapping location, which is not thereafter relocated in the manner prescribed by the Colorado statutes (sections 3160, 3162); and the resumption of development works on the senior claim in the succeeding years restores to its owner all his original rights.—

OSCAMP V. CRYSTAL RIVER MIN. CO., U. S. C. C. of App. 58 Fed. Rep. 293.

188. MORTGAGES—Consideration.—The compromise by a wife of a suit for divorce against her husband, and her abandonment of her alleged right of homestead in his property, is a valid consideration for a mortgage executed by the husband in her favor to secure a note. —MCCLURE V. MCCLURE, Cal., 34 Pac. Rep. 822.

139. MORTGAGE—Foreclosure Sale—Surplus.— Illegal attorney's fees, retained by the attorney for the mortgagee on a foreclosure sale, must be regarded as a part of the surplus, which belongs to the owner of the equity of redemption; and, if there has been no redemption, such owner may recover the amount from the mortgagee. — BAXTER'S ESTATE V. WILKINSON, Mich., 56 N. W. Rep. 931.

140. MORTGAGEE—Non-payment of Interest.—Where a trust deed authorizes the mortgagee to declare the entire debt due for default in the payment of interest, an agreement to forbear so to do for the non-payment of a specified installment, in consideration of the assignment to the mortgagee of all the rents accruing from the mortgaged premises, continues only for a reasonable time, and does not prevent the mortgagee from declaring the entire debt due for the non-payment of a subsequent installment of interest.—MARTIN V. LAND MORTG. BANK OF TEXAS, Tex., 23 S. W. Rep. 1032.

141. MORTGAGE FORECLOSURE — Attorney's Fee.—On foreclosure sale the mortgagee bid in the land for the full amount claimed, including excessive attorney's fees. The owner of the equity of redemption then redeemed by executing to the mortgagee's attorney a note for the full amount bid. The attorney remitted to the mortgagee in cash the full amount of the note, excepting attorney's fees, and sold the note. The note was subsequently adjudged invalid as to the amount of excessive attorney's fees therein contained, and the attorney was compelled to refund this amount to the holder of the note: Held, that the mortgagee was bound to make good to the attorney the amount so refunded, since the taking of the excessive attorney's fee was for his benefit, and he was primarily liable therefor.—OWEN V. BAXTER'S ESTATE, Mich., 56 N. W. Rep. 930.

142. MUNICIPAL CORPORATIONS—Changing Grade of Street.—Although the right to recover for damage to private property is reserved by the constitution, it is within the power of legislature to regulate the remedy, and prescribe the forms to be observed in order to enforce that right. The only limitation upon the power of the legislature, in that respect, is that the regulation must be reasonable, and provided by general laws of uniform application.—CITY OF LINCOLN V. GRANT, Neb., 56 N. W. Rep. 995.

143. MUNICIPAL CORPORATION — Contracts — Street Lighting.—The lighting of streets by electric arc lights placed above the intersections of streets is not "street work," within Mun. Corp. Act, § 777, as amended by St. 1891, p. 54, providing that in the erection of public buildings, and in all street and sewer work, it shall be done by contract let after notice by publication.—ELECTRIC LIGHT & POWER CO. V. CITY OF SAN BERNARDINO, Cal., 34 Pac. Rep. 819.

144. MUNICIPAL CORPORATION—Defective Sidewalk.—A complaint in an action for personal injuries sustained by falling into an opening in a public sidewalk, which alleges that it was defendant's duty, "at all times during which it has been permitted to maintain said opening," to keep the same properly protected, does not show that the opening was made and maintained by State or municipal authority, where other portions of the complaint negative the idea of such authorization or license, but should rather be construed as stating that the making and maintenance of the opening was by public sufferance.—NEW YORK LIFE INS. CO. V. SAVAGE, U. S. C. C. of App., 58 Fed. Rep. 338.

145. MUNICIPAL CORPORATIONS—Opening Streets.—Local Acts 1883, Act No. 281, providing for opening streets and alleys in Detroit, is unconstitutional only in so far as it declares that, in determining the damages where only a part of a lot is taken, the jury shall consider the benefits to the part not taken, and that these shall not be stated separately, but the net amount awarded. — TULLER V. CITY OF DETROIT, Mich., 56 N. W. Rep. 1031.

146. MUNICIPAL CORPORATIONS—Rights of Taxpayers. —One or more of the taxpayers of a city may sue to enjoin *ultra vires* acts of the city, which may injure them as taxpayers.—CITY OF ALPENA V. KELLEY, Mich., 56 N. W. Rep. 941.

147. NAMES—Idem Sonans.—The names Johnson and Johnston are *idem sonans* (sounding the same). Absolute accuracy is not required in spelling names in legal proceedings, especially when the difference in spelling is not misleading. — STATE V. JONES, Minn., 56 N. W. Rep. 1068.

148. NATIONAL BANKS — District Attorneys. — Under Rev. St. § 380, district attorneys are charged with the duty, under the direction of the solicitor of the treasury, of conducting suits brought by receivers of national banks in collecting assets and winding up their affairs, and they are not entitled to any compensation or allowance therefor beyond the salary attached to the office.—GIBSON V. PETERS, U. S. S. C., 14 S. C. Rep. 135.

149. NEGLIGENCE — Explosion of Powder Magazine.— Proof of actual and peaceable possession of land is sufficient to enable the possessor to maintain an action against a powder company for damages sustained to the buildings thereon by the explosion of a magazine erected and maintained by the company in violation of a city ordinance, and the admission in evidence of imperfect deeds in his chain of title is not prejudicial error.—HAZARD POWDER CO. V. VOLGER, U. S. C. C. of App., 58 Fed. Rep. 152.

150. NEGLIGENCE — Joint Defendants. — In an action against a road company and several other defendants for injuries sustained by reason of an excavation in the road, where the breach of duty in failing to properly guard the excavation charged against defendants was the separate tort of each defendant, and not the joint tort of all, and plaintiff sustained but a single injury as a result of the several torts, the jury cannot apportion the damages among the several tort-feasors, but the whole must be assessed against all the defendants found guilty.—WESTFIELD GAS & MILLING CO. V. ABERNATHEY, Ind., 35 N. E. Rep. 399.

151. NEGLIGENCE — Proximate Cause.—Failure of the owner of a cotton gin to gin cotton within the time he had contracted so to do is not the proximate cause of the subsequent destruction of the cotton by fire while at the gin, and he is not responsible for such destruction, unless he failed to use ordinary care for its preservation.—JAMES V. JAMES, Ark., 23 S. W. Rep. 1099.

152. NEGOTIABLE INSTRUMENTS — Action against Indorser.—A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But between the original parties a blank indorsement may be modified by parol. The entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the same.—HOLMES V. FIRST NAT. BANK OF LINCOLN, Neb., 56 N. W. Rep. 1011.

153. NEGOTIABLE INSTRUMENTS—Bona Fide Purchasers—Foreign Corporations.—It is no defense against negotiable paper in the hands of an innocent purchaser that the payee was a foreign corporation, which had failed to comply with the statutory conditions for doing business in the State, and that the paper grew out of business transacted there by it. — PRESS CO. V. CITY BANK OF HARTFORD, U. S. C. C. of App., 58 Fed. Rep. 321.

154. NEGOTIABLE INSTRUMENTS — Equitable Defenses.

—The knowledge of the cashier of a bank as to the defenses and equities existing against a promissory note made to him in his individual capacity, and by him transferred to the bank of which he is such cashier, upon its maturity, is the knowledge of the bank; and a renewal of such note by the makers in the name of the bank, at the request of such cashier, and the surrender of the original note after its maturity, does not constitute a new consideration for such renewal note, and will not preclude the makers from interposing any defense to the renewal note that could have been made to the original note in the hands of such cashier.—BLACK HILLS NAT. BANK OF RAPID CITY V. KELLOGG, S. Dak., 56 N. W. Rep. 1071.

155. NEGOTIABLE INSTRUMENT — Evidence.—An instrument made payable at a designated place may be given in evidence under a complaint counting on an instrument as if made payable generally.—KANSAS CITY, M. & B. R. CO. V. COBB, Ala., 13 South. Rep. 938.

156. NEGOTIABLE INSTRUMENT — Execution—Fraud.—Simultaneously with the execution of a note obtained by fraud, a paper was also obtained from the maker, giving assurance that the maker had no offset or defense to the note, and that it would be paid to any assignee: Held that, the two instruments being in effect but a single transaction, and the assurance in the one being the same as in the other, the maker was not estopped to defend against the note in the hands of an assignee.—HILL V. THIXTON, Ky., 23 S. W. Rep. 947.

157. NEGOTIABLE INSTRUMENT—Guaranty.—The consideration passing between the payee and the maker of a note is not sufficient to uphold a guaranty of the note, made, at the solicitation of the payee, several weeks after the execution of the note, where such guaranty was no part of the inducement to its execution.—BAKER V. WAHRMUND, Tex., 23 S. W. Rep. 1023.

158. NEGOTIABLE INSTRUMENT — Indorsement.—One who indorses a note on the express condition that it shall not be delivered unless another signs as comaker is not liable to the payee taking it without knowledge of the condition, or of the forgery of the comaker's signature.—SHARP V. ALLGOOD, Ala., 14 South. Rep. 16.

159. NEGOTIABLE INSTRUMENTS—Proof of Ownership.—A note, payable to plaintiff or order, and indorsed in blank, and in plaintiff's possession, is *prima facie* evidence of her ownership; and a further indorsement on such note from one bank to another for collection tends to corroborate such ownership.—GRANT V. ENNIS, Tex., 23 S. W. Rep. 998.

160. NEGOTIABLE INSTRUMENT—Transfer.—Plaintiff's intestate, who was trustee for several minors, and had loaned out the trust funds, declared his intention of creating a trust fund for the payment of his trust indebtedness out of the Chattanooga property and two notes owned by him, and executed a conveyance of the property to B. Plaintiff thereafter purchased of B the Chattanooga property and notes, which were transferred to her by B. By mistake, no mention of the notes was made in either the conveyance to the trustee or the conveyance to plaintiff: Held, that plaintiff acquired no title to the notes, and must account for them as property of intestate's estate.—PATTY V. JONES, Miss., 13 South. Rep. 931.

161. NEW TRIAL — Notice.—The presentation of a formal motion for a new trial in writing, and the withdrawal thereof, and substitution of another, does not constitute a withdrawal of the notice of intention to move for new trial, nor an abandonment of the proceeding.—WASTL V. MONTANA UNION RY. CO., Mont., 34 Pac. Rep. 844.

162. PARTNERSHIP.—Where a single person does business under a partnership name, the reputed firm may be sued under such name; and execution on judgment obtained will run against the partnership in name, leviable on its property, the action being in the nature of a proceeding *in rem*.—BIRMINGHAM LOAN & AUCTION CO. V. FIRST NAT. BANK OF ANNISTON, Ala., 13 South. Rep. 945.

163. PARTNERSHIP—Oil Lacs.—Oil from a well on a leasehold owned in common was run into pipe lines, and credited by the pipe-line company to the lessor and the tenants in common according to their respective interests. Afterwards, another well was drilled, under an agreement between the tenants in common by which one was to put up the derrick, and pay part of the cost of the well, and the other was to take charge of the work. The oil from the new well was disposed of in the same manner as the oil from the old well: Held, that the agreement in reference to the new well did not create a partnership between the parties.—DUNHAM V. LOVEROCK, Penn., 27 Atl. Rep. 990.

164. PARTNERSHIP — Surviving Partners.—Surviving partners, with the heirs of the interest of the deceased partner, continued the partnership business under a new name, transferred a bank deposit in the name of the partnership to an account in the new name, and deposited in the new name all moneys received in the business and insurance money received under a policy in the new name on partnership property: Held, that the surviving partners held all the money and property in trust for the partnership, and primarily for the benefit of the creditors, and that a receiver subsequently appointed for the partnership was entitled to draw all money, though deposited in the new name, to the exclusion of members of the partnership.—BOLLENBACHER V. FIRST NAT. BANK OF BLOOMINGTON, Ind., 35 N. E. Rep. 403.

165. PLEADING — Expunging Impertinent Matter.—Where the petition of a plaintiff in the District Court states a good cause of action, but also contains matter so impertinent or scandalous as to amount to a contempt, the court may expunge the objectionable matter, but cannot strike the petition from the files.—HERNDON V. CAMPBELL, Tex., 23 S. W. Rep. 980.

166. PRINCIPAL AND AGENT—Fraudulent Representations—Mercantile Agencies.—A mercantile agency which contracts with its subscribers to communicate, on request, information as to the financial responsibility of merchants and manufacturers throughout the United States and Canada, expressly stipulating that the information is to be obtained mainly by subagents or its subscribers, whose names are not to be disclosed, and that the "actual verity or correctness of the said information is in no manner guarantied," is not liable for loss occasioned to a subscriber by the willful and fraudulent act of a subagent in furnishing false information.—DUN V. CITY NAT. BANK OF BIRMINGHAM, U. S. C. C. of App., 58 Fed. Rep. 174.

167. PRINCIPAL AND SURETY— Contribution between Guarantor and Surety.—The mere fact that a guarantor of a promissory note, at the request of the principal maker of said note, received the amount loaned thereon, and paid it in the discharge of a judgment against said principal maker, whereby the lien of said judgment, paramount to that of a mortgage held by said guarantor upon real property of said principal maker, was released,—there being no fraud or circumvention shown,—does not affect the right of said guarantor to recover the amount which he has been compelled, as such, to pay, even though the parties whom he sues as makers of said note were stay sureties on the judgment so paid; and this rule is not qualified by the mere fact that the parties so sued were in fact but sureties on the note with the party who instructed said guarantor to make payment as aforesaid.—LICHTY V. MOORE, Neb., 56 N. W. Rep. 965.

168. PROCESS—Service—Publication — Attachment.—Service upon a non-resident by publication prior to attachment of his property is a nullity, and is not made good by a subsequent attachment.—BAUMGARDNER V. BONO FERTILIZER CO., U. S. C. C. (Va.), 58 Fed. Rep. 1.

169. PROCESS—Service by Publication.—Where, in a chancery suit, an order of publication is obtained early on Monday on an affidavit made at a late hour on Saturday, alleging that defendant is a resident of the

State of Washington, there is sufficient diligence, as there is little probability of a residence in Washington being lost, and one in Michigan gained, in the meantime.—ADAMS v. HOSMER, Mich., 56 N. W. Rep. 1051.

170. PUBLIC LAND—Homestead—Actual Settlement.—Where a man, with his wife, goes on vacant land, and makes slight improvements thereon, which are completed by the middle of the day, and the following day made application to the surveyor, as required by statute, but does not return to or move his family on the land until three or four months afterwards, there is no "actual settlement" on the land before the application is made, and the application and survey made pursuant thereto are void.—BUSK v. LOWRIE, Tex., 23 S. W. Rep. 983.

171. RAILROAD COMPANY—Contributory Negligence.—In an action against a railroad company for killing a traveler at a highway crossing, where negligence by the railroad company is clearly established, the defense of contributory negligence must be clearly made out to warrant the court in taking the case from the jury; and, if inferences other than that of contributory negligence may be fairly drawn from the evidence the question is for the jury.—WELLER v. CHICAGO, M. & ST. P. RY. CO., Mo., 23 S. W. Rep. 1061.

W. Rep. 1061.

172. RAILROD COMPANIES—Killing Stock—Contributory Negligence.—Owners of stock in the Indian Territory have a right to let them run at large, and it is not contributory negligence to turn horses loose to graze in the vicinity of a railroad track, upon which they stray and are killed.—EDDY v. EVANS, U. S. C. C. of App., 58 Fed. Rep. 151.

173. RAILROAD COMPANIES—Receivers—Leased Lines.—The receivers of a railroad company have no power to abrogate a valid lease of railroad property, made to it by another company; and, as between lessor and lessee, the lease must stand until abrogated under some of the conditions contained therein.—NEW YORK, P. & O. R. CO. v. NEW YORK, L. E. & W. R. CO., U. S. C. C. (Ohio), 58 Fed. Rep. 268.

174. RAILROAD COMPANIES—Right of Way over Public Lands.—The right of way privilege conferred by the act of March 3, 1875, does not attach on the filing and acceptance of the railway company's articles of incorporation and proofs of organization, but when the line of road is definitely fixed, either by actual construction or the filing of a map showing its definite location.—DENNER & R. G. R. CO. v. HANOUM, Colo., 34 Pac. Rep. 838.

175. RAILROAD COMPANY—Surface Water—Obstruction.—A railway company, in the absence of negligence or unskillfulness in the construction of its road, will not be liable to an adjoining landowner for injuries from the overflow of surface water occasioned by the obstruction of the roadbed.—MISSOURI PAC. RY. CO. v. RENFRO, Kan., 34 Pac. Rep. 802.

176. RAILROAD LAND GRANTS.—A Land-grant railroad company, having both actual and constructive notice, is guilty of laches in delaying 14 years to assert title to lands lying within its grant limits, which have been selected as indemnity lands by another land-grant company, certified as such to the State, and by it conveyed to the company, and large portions of which have been openly sold by the latter to purchasers and settlers; especially when, by such delay, documentary evidence has been lost which would probably render unassailable defendant's title to a large portion of the disputed lands.—SAGE v. WINONA & ST. P. R. CO., U. S. C. C. of App., 58 Fed. Rep. 297.

177. REAL ESTATE AGENTS—Commissions.—In assumpsit on a special contract, by which defendant, agreed to pay plaintiff a certain commission for selling timber lands, it is error to admit evidence of what he expended in his efforts to make the sale, and of the value of his services.—MCDONNALD v. ORTMANN, Mich., 56 N. W. Rep. 1055.

178. REAL ESTATE AGENTS—Commissions.—In an action for commissions on a sale of defendant's house it appeared that the purchaser employed the agent to look up a house, knowing that the agent had defendant's for sale; that the agent informed defendant of his relations with the purchaser, whom he took to see defendant, and who talked with the latter about the sale: Held, that the court rightly charged that, "if plaintiff was acting solely as agent of B (the purchaser) to buy B a house, and not as agent for defendant to sell her house, there would be no claim against defendant; but if he received the property for sale, and his interviews with B grew out of such fact, his conduct would not bear the interpretation that he was acting as agent for B, and not for defendant."—LORIMER v. BOYLAN, Mich., 56 N. W. Rep. 1043.

179. RES JUDICATA.—A judgment against the principal in an official bond, recovered for acts or omissions which were a breach of the conditions of such obligation, is *prima facie* evidence against the sureties.—BEAUCHAINE v. MCKINNON, Minn., 56 N. W. Rep. 1065.

180. RES JUDICATA.—In an action by a father for the loss of his son's services because of personal injuries alleged to have been sustained while employed by defendant, the court found that the son was not injured while in the service of defendant: Held, that such finding is not admissible to prove the same defense in an action by the son against the same defendant to recover for such personal injuries.—GUY v. FISHER & BURNETT LUMBER CO., Tenn., 23 S. W. Rep. 972.

181. SALE—Buyer's Refusal to Perform.—An undivided interest in a partnership is personalty subject to private resale by the seller on the wrongful refusal of the buyer to perform the bargain; and when the seller has given the buyer proper notice of his intention to resell in this way, and of the best price offered him, and it does not appear that he could have realized any more than he did, he may recover of the buyer the difference between the price realized and the contract price.—VAN BROCKLEN v. SMEALLIE, N. Y., 35 N. E. Rep. 415.

182. SALE—Contract—Construction.—An agreement of agency between plaintiffs and defendant for the sale of plaintiffs goods by defendant during the season of 1891 contained a provision that defendant "does hereby order" certain goods of plaintiffs, at prices named, subject to a discount of twenty per cent., payable in four months after May 1, 1891, with a promise by defendant to give a note when requested: Held, that the agreement, notwithstanding its other undertakings, was made a contract of purchase by such provision.—ASPINWALL MANUF'G CO. v. JOHNSON, Mich., 56 N. W. Rep. 932.

183. SALE—Good Will—Damages.—A party sold his business and the good will of the same to another, and agreed not to do a general business at that point. He violated his agreement, and engaged in business at the place named. The matter was then submitted to arbitration, and an award made assessing damages and restraining the vendor from again doing business at that place. Afterwards he carried on business at the place named: Held, that the purchaser was entitled to compensation for a violation of the agreement, and the damages could not be considered excessive.—NELSON v. HIATT, Neb., 56 N. W. Rep. 1029.

184. SALE—Statute of Frauds.—A verbal contract, to be void under the first clause of section 8 of our statute of frauds, must be one that, by its terms, is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time.—POWDER RIVER LIVE-STOCK CO. v. LAMB, Neb., 56 N. W. Rep. 1019.

185. SALE—Time for Delivery—Waiver.—An instruction that notwithstanding the provision in a contract by which plaintiff was to deliver lumber to defendant within a certain time, if the jury should find that defendant waived the requirement, and accepted and hauled lumber from plaintiffs wharf thereafter, defendant could not have damages for the failure to deliver within the specified time, does not treat the mere ac-

ceptance as a waiver.—BAGBY v. WALKER, Md., 27 Atl. Rep. 1032.

186. SALE—Warranty.—In an action for the price of a barge sold while in the water, it being contended by plaintiff that the sale was either on inspection without any warranty, or a mere warranty of its being in condition to use at once, while defendant contended that there was a warranty of soundness, an instruction should have been given on both theories.—EUREKA FERTILIZER CO. OF CECIL COUNTY v. BALTIMORE COPPER, SMELTING & ROLLING CO., Md., 27 Atl. Rep. 1035.

187. SALE BY AGENT — Authority. — Where cotton is left with an agent to be sold at the highest market price upon approval by the principal, a sale by the agent without the principal's consent conveys no title. —SKEETERS v. SLATER MILLING CO., Tex., 23 S. W. Rep. 1000.

188. SCHOOLS—Employment of Teachers. — When a contract for a teacher's services is annulled by the school board during the vacation, and before the time for commencement of such services, the teacher need not immediately seek other employment, but may insist on the contract, and tender her services at the stipulated time. — FARRELL v. SCHOOL DIST. NO. 2 OF TOWNSHIP OF RUBICON, Mich., 56 N. W. Rep. 1053.

189. SCHOOL DISTRICTS—Investment of School Fund. —A school district is a municipal corporation, within the meaning of Const. art. 16, § 5, which directs that the permanent school fund "may be invested in national, state, county or municipal bonds."—STATE v. GRIMES, Wash., 34 Pac. Rep. 836.

190. SHERIFFS — Return — Execution. — In an action under Code Civil Proc. §§ 692, 693, by an execution debtor against a sheriff, to recover the statutory penalty and damages for selling land without notice, the sheriff's return on the execution, that he has given notice, is not conclusive in his favor.—RAKER v. BUCHER, Cal., 34 Pac. Rep. 849.

191. SPECIFIC PERFORMANCE — Defective Title.—Upon the facts as found on the trial of an action brought by a vendor of real property to compel specific performance of a contract to sell and convey in respect to the condition and marketability of his title, it is held that said vendor could not recover. — COREY v. CLARKE, Minn., 56 N. W. Rep. 1063.

192. SPECIFIC PERFORMANCE — Sale by Trustee. — In determining whether a sale by a trustee was fair, and free from collusion, a subsequent offer by the purchaser's disappointed competitors, who formerly offered a much smaller amount, and absolutely refused to give more, is no true criterion of value; and no weight should be attached to their statements of a secret purpose to give a much larger sum, rather than lose the property. — WICKERSHAM v. RICKER, U. S. C. C. of App., 58 Fed. Rep. 282.

193. SPECIFIC PERFORMANCE—Tender.—An agreement to sell the whole capital stock of a corporation, the first payment to be made in cash on the subsequent signing of a more formal contract, there being no stipulation as to time of delivering the stock, is not specifically enforceable when the purchaser has failed to tender the first payment as agreed, demanding that the stock should be first deposited in a bank.—WESCOTT v. MULVANE, U. S. C. C. of App., 58 Fed. Rep. 305.

194. STATUTES — Amendment. — The house journal showed the due introduction of a bill entitled "To authorize cities and townships to purchase or condemn the rights of toll-road companies in their streets and highways, and to authorize said companies to sell such parts of their roads." The journal referred to the bill in the same way until after final vote on its passage, when the title was amended to "A bill to repeal an act entitled 'An act to incorporate the D Co.,' approved March 23, 1848, and to provide for winding up the affairs of said company:" Held, not an amendment, but a new bill, which, having been introduced after the first 50 days of the session, in violation of Const. art. 4, § 28, was of no effect. — ATTORNEY GENERAL v. DETROIT & S. PLANK-ROAD CO., Mich., 56 N. W. Rep. 943.

195. TAXATION—Bonds.—Under Act June 8, 1891, which provides for the taxation of bonds when held by an active trustee for the use of any other person, etc., bonds held by an active trustee who resides in Pennsylvania, and was appointed by the will of a resident of such State, are taxable there, though the courts of another State exercised jurisdiction of the settlement of the estate of the testator by whose will the trust was created; especially, where all the beneficiaries affected by the collection of the tax are domiciled in the former State.—GUTHRIE v. PITTSBURGH, C. C. & ST. L. RY. CO., Penn., 27 Atl. Rep. 1052.

196. TAXATION—Equalization—Judgment of Board.—The action of the board of equalization is *quasi* judicial, and since it has authority, under Rev. St. 1881, § 6558, to assess the capital stock of a corporation, where the value thereof exceeds the value of its tangible property, such an assessment, if erroneous, must be corrected by appeal, or some other authorized direct proceeding, and cannot be collaterally attacked in a suit by the corporation to enjoin collection of the tax on the ground that its capital stock did not in fact exceed its tangible property in value.—JONES v. RUSHVILLE NATURAL GAS CO., Ind., 35 N. E. Rep. 390.

197. TAXATION — Exemption — Married Woman.—Under Const. 1870, art. 2, § 28, which provides that the legislature shall except from taxation $1,000 worth of personal property in the hands of "each taxpayer," a married woman is entitled to such exemption, though her husband is entitled to, and has been allowed the same exemption; such exemption being to the taxpayer, and not to the family.—FIRST NAT. BANK OF MORRISTOWN v. MAYOR, ETC., OF MORRISTOWN, Tenn., 23 S. W. Rep. 975.

198. TAXATION—Illegal Taxes—Payment.—Where one pays an illegal demand for taxes, with full knowledge of the facts which render such demand illegal, without any urgent necessity therefor, such as the threatened immediate seizure or sale of his property, such payment will be deemed voluntary, and cannot be recovered in an action at law.—DIXON COUNTY v. BEARD SHEAR, Neb., 56 N. W. Rep. 990.

199. TAXATION — Tax Titles — Collateral Attack —As the statute makes service by publication on non-resident owners of land, in chancery proceedings to enforce the tax lien thereon, equivalent to personal service, a decree foreclosing the tax lien on land is conclusive on a non-resident owner, where service was made by publication, and he cannot afterwards attack the validity of the tax in an action of ejectment against the purchaser.—COLE v. SHELP, Mich., 56 N. W. Rep. 1052.

200. TELEGRAPH COMPANIES — Contract.—The addressee of a telegram, in anticipation of its receipt, informed the receiving agent that he expected a message from his father, calling his mother and himself to the bedside of a sick brother; and the agent agreed to deliver the message to a person residing near the telegraph office, who was to take it to the addressee: Held, that the agreement of the agent was within the scope of his authority, and constituted a part of the contract with the telegraph company for transmission and delivery.—WESTERN UNION TEL. CO. v. EVANS, Tex., 23 S. W. Rep. 998.

201. TELEGRAPH COMPANIES—Damages.—The measure of damages against a telegraph company for deviating from the terms of a message correctly reporting the state of the market for a particular article, which the receiver of the message is induced by it to send forward for sale, is the difference between the actual state of the market and the terms of the message, as erroneously transmitted, overstating it, provided the plaintiff's actual loss amounts to that much. —HOLLIS v. WESTERN UNION TEL. CO., Ga., 18 S. E. Rep. 287.

202. TELEGRAPH COMPANIES—Message on Sunday.—By section 4579 of the Code, it is made unlawful for any person (and this includes a telegraph company) to pursue his business or the work of his ordinary calling

upon the Lord's day, works of necessity or charity only excepted. It follows that a telegraph company is not put by law, and cannot put itself by contract, under any duty to transmit and deliver messages on that day, unless, by reason of the subject-matter of the messages in question, their transmission and delivery can be fairly considered as a work of necessity or charity.—WESTERN UNION TEL. CO. v. HUTCHENSON, Ga., 18 S. E. Rep. 297.

203. TELEGRAPH COMPANIES — Penalties—Interstate Commerce.—Code, § 1292, provides that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver a dispatch as promptly as practicable the company shall forfeit $100 to the person sending the dispatch or to the person to whom it was addressed: Held (1), that a suit to enforce such forfeiture need not be brought in the name of the commonwealth; (2) said statute is not repugnant to the interstate commerce clause of the constitution of the United States.—WESTERN UNION TEL. CO. v. TYLER, Va., 18 S. E. Rep. 280.

204. TOWNS — Streets — Dedication.—Where a person owns land in fee, or the common source of title from whom all parties interested claim, and has it surveyed into lots, blocks, streets, and a map of it, which he recognizes as being correct, is made with a view of establishing a town, and he sells lots with reference to the map designating the parcels sold and the streets according to the map, there is an irrevocable dedication of the streets to the public, whether the town at that time was incorporated or not.—HAM v. COMMON COUNCIL OF DADEVILLE, Ala., 14 South. Rep. 9.

205. TRADE-MARK — Geographical Names.—The word "Columbia," being a word in common use as a geographical name, is not the subject of exclusive appropriation for a trade-mark.—COLUMBIA MILL CO. v. ALCORN, U. S. S. C., 14 S. C. Rep. 151.

206. TRADE-NAMES — Transfer — One's Own Name.—A contract whereby one parts with the right to use his own name in a certain trade connection will not be extended by the courts any further than the clear terms of the agreement show his intention to do so.—CHATTANOOGA MEDICINE CO. v. THEDFORD, Ga., 58 Fed. Rep. 347.

207. TRESPASS TO TRY TITLE — Improvements. — In trespass to try title, defendant may be allowed for improvements made by him while a possessor in good faith, he having held a deed from the tax collector purporting to convey the land for taxes due by the unknown owner.—FRANKLIN v. CAMPBELL, Tex., 23 S. W. Rep. 1003.

208. TRESPASS TO TRY TITLE—Purchase from State.—Plaintiff purchased from the State the east half of a certain surveyed section, and one of the defendants purchased the west half. It afterwards appeared that all of the east half, except 67 acres, was covered by a prior survey. The land commissioner had no knowledge of the conflict, and all parties thought each purchaser had a full half section: Held, that as plaintiff never intended to buy, and the State did not intend to sell him, any part of the west half of the section, he could not recover from the defendants any portion thereof to make up the deficiency in the east half.—CREECH v. DAVIDSON, Tex., 23 S. W. Rep. 995.

209. TRUSTS—Adverse Possession of Trust Estate.—A stranger may, by adverse possession or use of land for the requisite period of time, bar both the legal estate of the trustee and the equitable estate of the *cestui que* trust.—SNYDER v. SNOVER, N. J., 27 Atl. Rep. 1013.

210. TRUST—Resulting Trust.—In a suit by a widow to recover property, which she contended her husband had bought, but that the title was taken by his brother to secure the price, there was evidence of a verbal agreemeet that the payment of the purchase money was a loan, but the witnesses testified that the agreement was incorporated in a lease. The lease gave complainant's husband an option to buy the property within a certain time. There was evidence of repeated declarations by complainant's husband that his brother, and not himself, had bought the property: Held, that the evidence failed to establish a resulting trust.—MCRAE v. MCRAE, Md., 27 Atl. Rep. 1038.

211. VENDOR AND PURCHASER—Construction of Contract.—In a contract for the sale of property, a provision that it shall "be free from all liens and incumbrances," and that the "hand money" shall be "refunded if title should not prove good on examination of records, or cannot be made good," is equivalent to a covenant to convey a marketable title.—HERMAN v. SOMERS, Penn., 27 Atl. Rep. 1050.

212. VENDOR AND VENDEE—Land Contract.—In an action by a vendor of real estate to foreclose a land contract or bond for a deed, on account of the failure and refusal of the vendee to pay the purchase money according to the contract, a tender of a deed by the plaintiff before bringing the suit need not be shown.—HARRINGTON v. BIRDSALL, Neb., 56 N. W. Rep. 961.

213. WATERS—Riparian Rights—Water Companies.—A water company having contracts to supply a city and a railroad company with water for its own profit has no greater power, as a riparian proprietor, to take water from an unnavigable stream, than a private individual has.—SAUNDERS v. BLUEFIELD WATER-WORKS & IMP. CO., U. S. C. C. (Va.), 58 Fed. Rep. 133.

214. WATERS—Surface Water—Obstruction.—Where the gravamen of plaintiff's action was the alleged negligent, improper, and careless construction of an embankment, from which resulted the overflow of plaintiff's land, it is proper to presume, in the absence of any proof on the subject, that said embankment was, for railway purposes, properly constructed.—MORRISSEY v. CHICAGO, B. & Q. R. CO., Neb., 56 N. W. Rep. 946.

215. WILL—Conflict of Laws.—The statutes of New York against perpetuities, indefinite trusts, etc., are local in their general scope and effect, and do not forbid a bequest to charity in New York by a testator domiciled in a foreign country, where such bequest is valid by the law of the foreign country, but is not in conformity to the local statutes.—DAMMERT v. OSBORNE, N. Y., 35 N. E. Rep. 407.

216. WILL—Evidence—Physician. — Code Civil Proc. § 1881, subd. 4, providing that a physician cannot, without consent of the patient, be examined as to any information acquired in attending the patient, necessary to enable him to act, cannot be waived by a contesting heir as against the proponent widow, so that a physician, in a will contest based on testator's incapacity, can testify that he prescribed for testator for mental trouble. — IN RE FLINT'S ESTATE, Cal., 34 Pac. Rep. 862.

217. WILLS—Revocation by Marriage. — Where testator's will was executed before his marriage, and made no provision for his wife, and testator and his wife released all their claims in the estates of each other by an antenuptial contract, the wife could not appeal from an order admitting the will to record, on the ground of revocation by the marriage.—BIGGERSTAFF'S EX'RS v. BIGGERSTAFF'S ADM'R, Ky., 23 S. W. Rep. 965.

218. WITNESS — Transactions with Decedents. — One who, by himself or another, has bid off property at sheriff's sale, is generally competent, under the evidence act of 1889, to testify in his own favor, against the administrator of the defendant in the execution under which the sale was made, as to any fact involved in the controversy, except "as to transactions or communications with such deceased person." The sheriff being still alive, transactions and communications with him may be proved, the same as if the defendant in execution were alive also.—PURYEAR v. FOSTER, Ga. 18 S. E. Rep. 317.